



U.S. Small Business  
Administration

# **Legislative & Regulatory Update**

**For Small Business Government Contracting  
Programs**

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Representative**

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# Legislative Action

# The Price Act

Promoting Rigorous and Innovative Cost Efficiencies for Federal Procurement and Acquisitions Act of 2021

[Pub. Law 117-88](#), signed by the President on 2/22/21

- DHS operates a Procurement Innovation Lab aimed at experimenting with innovative acquisition techniques
- Directs DHS to issue an annual report on innovative procurement techniques, including those used to meet small-business goals.
  - Sunsets after 3 years
- Requires OMB to convene the CAO Council to examine best practices in acquisition innovation, including in contracting with small businesses
  - CAO Council may form a working group to address
  - CAO Council (or the working group) must issue a report on innovative acquisition techniques that lead to meeting or exceeding small-business goals

# Introduced in the House

- [H.R. 4697](#), to strike section 8(a)(11), which is the basis of [bona-fide-office rule](#) in the 8(a) program
  - SBA has temporarily waived the requirement: [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 owned by Guam natives or direct ancestors, define Native Northern Marianas Organizations, and give such organizations the same treatment as Native Hawaiian Organizations for 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.

# Passed House and Senate – in conference

- [H.R. 4521](#), America COMPETES Act of 2022
  - Sect. 50101 – would require one-third small-business purchasing for certain items from frontline operational components (TSA, Secret Service, FEMA, and others)
  - Sect. 50103 – would create a DHS mentor-protégé program for small businesses, HBCUs, and MSIs.
  - Sect. 61007 – would include small-business contracting percentage in the annual report of the Defense Production Act Fund

# Executive Action

# OMB Memorandum: Advancing Equity in Procurement

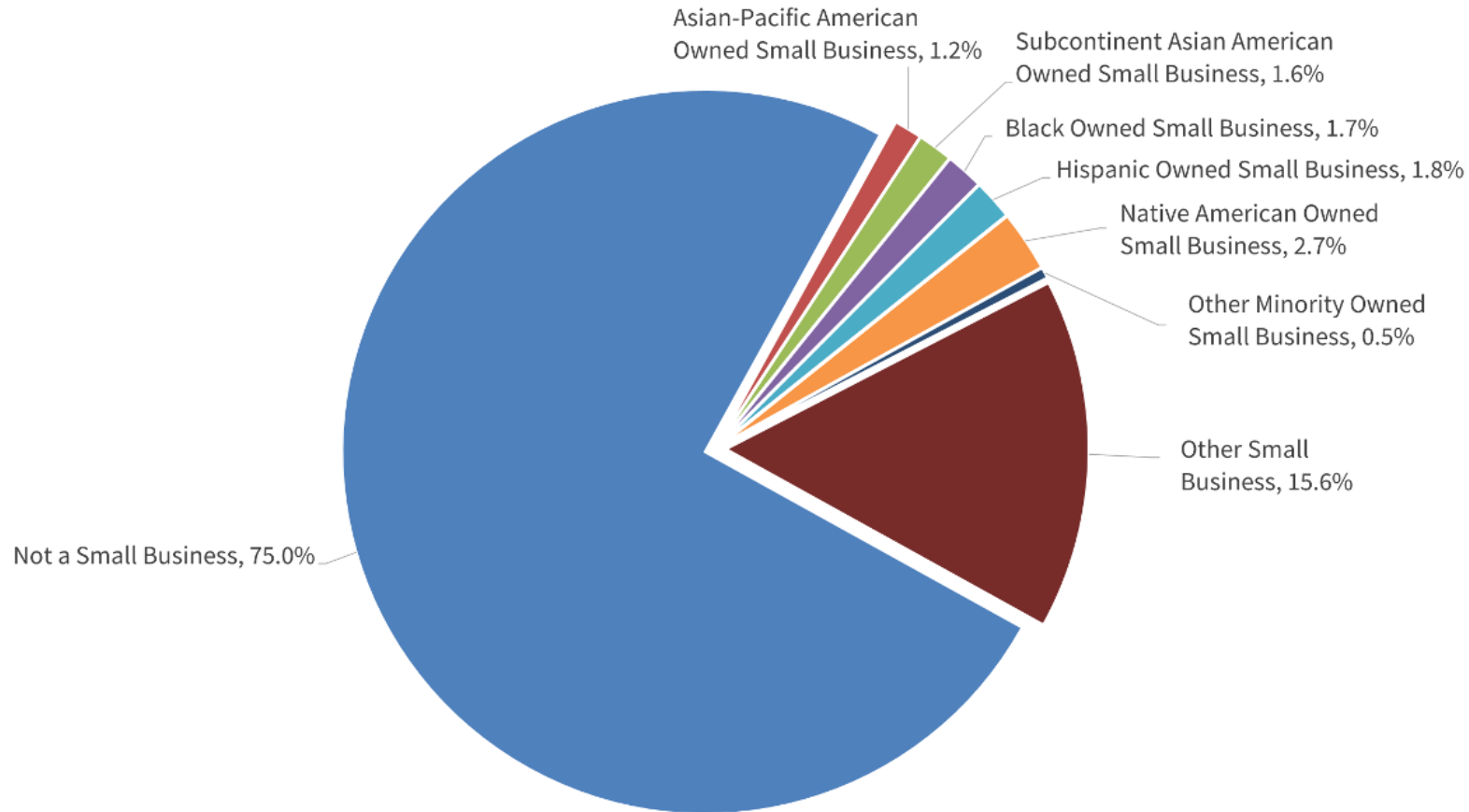
M-22-03, Dec. 2, 2021 – implementing Executive Order 13985

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

# SBA Disaggregated Data Release

[SBA.gov](https://www.sba.gov) – as discussed on [whitehouse.gov](https://www.whitehouse.gov) and analyzed by CEA

FY 2020 Federal Contracting<sup>1</sup> by Race<sup>2</sup> and Business Size



1. Includes only small-business-eligible dollars (\$559 billion in FY 2020). This includes all Federal contracts except those excluded by SBA's Goaling Guidelines. This data does not apply the double-credit and subcontracting adjustments required by statute for SBA's annual scorecard.

2. Racial and ethnic categories are reflected here as they appear in the System for Award Management when an entity registers to do business with the government. Classifications are self-reported. The other small business category reflects those firms who did not report as being minority-owned.



# **Recent SBA and FAR Regulatory Action**

## **Final Rules (4): Revised Monetary Based Size Standards**

[87 FR 18607](#) ; [87 FR 18627](#); [87 FR 18646](#); [87 FR 18665](#)

- SBA issued four final rules to address monetary-based size standards, including all used in government procurement
- Reviewed 468 size standards
  - 229 increases
  - No decreases because of COVID-19
- Notable changes
  - Engineering Services, 541330 to \$22.5 million
  - Administrative Management and Consulting Services, 541611 to \$21.5 million
  - Architectural Services, 541310 to \$11 million

## **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)

## Direct Final Rule: HUBZone Governor-Designated Covered Areas

### 84 FR 62447

- Added new type of HUBZone: “Governor-Designated Covered Area”
  - Non-urbanized areas with populations of 50,000 or less
  - Unemployment of at least 120% the state or US average
  - Opportunity Zones encouraged
  - Governors must petition SBA – limited to one petition per year
- Published November 11, 2019
- Effective January 1, 2020
- Illinois and Colorado granted expansions

# Direct Final Rule: Extending HUBZone Map Freeze

## 86 FR 23863

- Extends the HUBZone Map freeze until June 30, 2023
  - Qualified census tract data using the 2020 Census results will not be available until late 2022.
  - Applies to all current Redesignated Areas and Qualified Base Closure Areas, and most current Qualified Disaster Areas.
  - The HUBZone Map has been updated to reflect the new expiration date for those areas.
  - After SBA receives the Census data from HUD, SBA will post a list identifying areas newly designated as Qualified Census Tracts, Qualified Non-metropolitan Counties, and Redesignated Areas, so that firms can plan accordingly.

# HUBZone: New Qualified Non-Metropolitan Counties

## 84 FR 65222

- In early August, the HUBZone Map was updated to add 452 new Qualified Non-Metropolitan Counties (QNMCS).
- This update is in response to a statutory change to the definition of the term “Qualified Non-Metropolitan County” that went into effect in 2020.
- SBA conducted an analysis using the amended definition to identify additional non-metropolitan counties that would qualify as QNMCS and have added them to the HUBZone map.

## **SBA Proposed Rule: Calculation of Employee-Based Size Standards**

### **86 FR 60396**

- Proposes to use a 24-month average to calculate a business's number of employees for eligibility purposes in all of SBA's programs
- 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**

- 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
  - Requested 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

[87 FR 8628](#) (furniture); [87 FR 8630](#) (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 Final Rule: Limitations on Subcontracting

## 86 FR 44233

- 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 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

- COs must provide the PCR a copy of any proposed acquisition package, at the PCR's discretion
- 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: Good Faith in Small Business Subcontracting**

## **86 FR 44249**

- Provides examples of activities that contracting officers may consider when evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan.
- Requires prime contractors with commercial subcontracting plans to include indirect costs, with certain exceptions, in their subcontracting goals

# FAR Final Rule: Consolidation and Bundling

## 86 FR 61038

- 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: 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 5<sup>th</sup> year on an 8(a) contract if firm is no longer an 8(a) participant

# 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

# Upcoming SBA proposed rules

1. NDAA 2020, Credit for Lower Tier Subcontracting and Other Amendments
2. Small Business Size Standards: Manufacturing and Industries With Employee Based Size Standards in Other Sectors Except Wholesale Trade and Retail Trade
3. HUBZone Program Updates and Clarifications
4. Small Business Size Standards: Adoption of 2022 North American Industry Classification System for Size Standards
5. Small Businesses in US Territories; Eligibility of the Commonwealth of the Northern Mariana Islands

# Upcoming FAR proposed rules

1. Proposed 2022-002, Exemption of Certain Contracts from the Periodic Inflation Adjustments to the Acquisition-Related Thresholds
2. Proposed 2021-020, Limitations on Subcontracting Revisions
3. Proposed 2021-012, 8(a) program
4. Proposed 2021-011, Past Performance of First-Tier Subcontractors
5. Proposed 2021-010, Subcontracting to Puerto Rican and Other Small Businesses
6. Proposed 2021-009, Protests of Orders Set Aside for Small Business

## Upcoming FAR proposed rules (cont.)

7. Proposed 2020-016, Representation of Size and Socioeconomic Status
8. Proposed 2020-010, SBIR/STTR
9. Proposed 2020-007, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns
10. Proposed 2019-008, Small Business Program Amendments

# Upcoming FAR final rules

1. Final 2020-013, Certification of Women-Owned Small Businesses
2. Final 2020-007, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns
3. Final 2019-007, Update of Historically Underutilized Business Zone Program
4. Final 2018-020, Construction Contract Administration
5. Final 2017-019, Policy on Joint Ventures
6. Final 2016-002, Applicability of Small Business Regulations Outside the United States

# Notable Legal Decisions



# GAO protest on joint ventures' security clearances

[InfoPoint LLC, B-419856](#), Aug. 27, 2021; see also [Amaze Techs., LLC, B-419919.2](#)

- 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.



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