



U.S. Small Business  
Administration



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# Legislative & Regulatory Update

## For Small Business Government Contracting Programs

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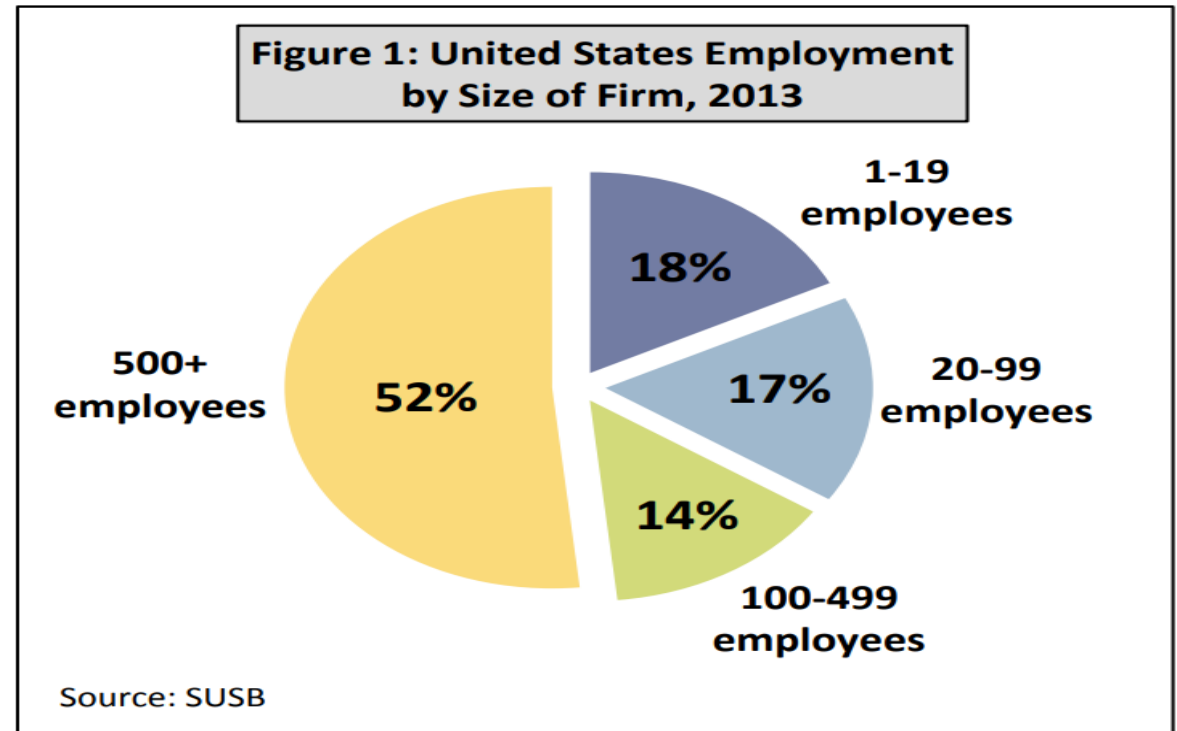
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recovery is still needed in these areas. (Source: BLS, CEA)

## Employment

- U.S. small businesses employed about half or **56.1 million** of the nation's private workforce in 2012. (Source: SUSB)
- Almost all firms with employees are small. They make up **99.7 percent** of all employers nationally. (Source: SUSB)
- Firms with fewer than 100 employees have the largest share of small business employment. **Figure 1** offers further detail.
- Nationally, small businesses created **2,175,253** net new jobs in 2012. The biggest gain was in the smallest firm size category of 1-4 employees. (Source: BDS)
- The number of people who were primarily self-employed in 2013 decreased by **1.2 percent** relative to the previous year.
- The nation's private-sector employment increased by **2.3 percent** over the 12-month period ending in October 2014. This was above the annual average growth rate of **1.7 percent** for the previous year. (Source: BLS)





# SBTW19

## WHY SMALL BUSINESS? INFRASTRUCTURE



It takes a nation to support a nation!



Promotes Innovation

**Low**ers Prices

Reduces Risk

# Recent Legislative Action

# John S. McCain National Defense Authorization Act for FY 2019

Small Business Matters (sections 851-862)

- Included here because most firms who work with NASA also work with DOD and the direction of DOD may reflect the direction of the Fed as a whole.
- More limited on Small Business contracting than previous NDAAAs (2013 thru 2017)

# John S. McCain National Defense Authorization Act for FY 2019

Small Business Matters (sections 851-862)

## Summary:

- Less focus on goals and %s.
- Prompt payment (Prime and Subcontracting)
- SBIR (Small Business Innovation and Research)
- Construction contracting
- Goaling for Puerto Rico contractors
- A/E for military housings



# NDAAs DOD-specific provisions on strategy and prompt payment

Sect. 851, 10 USC 2283; Sect. 852, 10 USC 2307(a)

- Develop and implement a small business strategy to better leverage small businesses as a means to enhance or support mission execution
  - include plans to integrate small businesses into a holistic view of industry
  - realign the Department's small business programs with agency mission under a unified management structure
  - clarify points of entry into the defense market
- Prompt payments to small business contractors
  - prompt payment goal of 15 days for DOD small business prime contractors
  - encourage other-than small prime contractors to accelerate payments to their small business subcontractors

# NDAAs 2019 SBIR Amendments

Sect. 854, 15 USC 638

- Extend the SBIR and STTR programs to 2022
- Extends the following pilot programs to 2022: direct to phase II awards, the civilian commercialization readiness program, NIH phase 0 proof of concept, and the administrative funding program
- Pilot program to accelerate DoD awards from notification of award to funding and to reduce the time between phase I and phase II awards. Required GAO to complete reports examining timelines to award across DoD and the civilian agencies.
- Technical and Business Assistance (TABAs) – Identify vendors to assist with product sales, IP protections, market research, market validation, and development of regulatory plans and manufacturing plans
- TABAs - Provide \$6,500 per phase I and \$50,000 per phase II award for such assistance

# NDAAs 2019 Construction change order transparency

Sect. 855, 15 USC 644(w)

**For Administrative Change Orders, Require Federal agencies to:**

- Provide information about an agency's policies
- Track and report performance with regards to definitizing requests for equitable adjustments.
- Included Agencies past performance information in the solicitations.
- The following times periods after request for equitable adjustment:  
30, 60, 90, 180, 365, 365+ days

# NDAA 2019 Puerto Rico Small Business Credit

Sect. 861, 15 USC 644(x)

- Definition for Puerto Rico businesses = small business with principal office in PR
- Double credit for prime awards to Puerto Rico businesses
- Separate report to SBA and publicly available
- Mentor past performance credit for subcontracts to Puerto Rico protégé
- Mentor application of costs incurred for training to Puerto Rico protégé

# NDAA 2019 Set-aside threshold for A/E and construction

Sect. 2804, 10 USC 2855

- Architectural and engineering services and construction design in connection with a military construction project or a military family housing project
- Below \$1,000,000 must follow set-aside provisions
- Does not restrict award under 8(a) program
- *Reverses old (1980's) rule that prohibited set-asides over \$85,000 threshold*
- Implemented in 84 FR 18160 (April 30, 2019)

# Veterans Small Business Enhancement Act of 2018

[Public Law No. 115-416](#); 15 U.S.C. 657b(g)

- Amends the Small Business Act to direct SBA to give access to and manage the distribution of U.S.-owned surplus property to small businesses owned and controlled by veterans.
- SBA intends to execute a memorandum of agreement between the SBA, the General Services Administration, and the head of the state agency for surplus properties.

# Small Business Runway Extension Act of 2018

[Public Law No. 115-324](#) ; 15 U.S.C. 632(a)(2)(C)(ii)(II)

- Modifies the method for prescribing size standards for small businesses
- Under prior law, firms in industries with receipts-based size standards calculated size based on annual average gross receipts over three years
- Provides that, unless an agency has specific authorization for size standards, an agency's receipts-based size standards for **service-industry** firms be based on annual average gross receipts over five years
- Leaves other industries unchanged at three years.

# Runway Extension Act Information Notice

[www.sba.gov/sites/default/files/resource\\_files/6000-180022SBRunwayExtensionAct.pdf](http://www.sba.gov/sites/default/files/resource_files/6000-180022SBRunwayExtensionAct.pdf)

- In an [Information Notice](#), SBA announced that the averaging period change is not effective until implemented in SBA's regulations.
- Until SBA changes its regulations, businesses still must report their receipts based on a three-year average.
- SBA intends to issue a proposed rule in the next few weeks.



# Recent SBA Regulatory Action

4 Final Rules/Actions

3 Proposed Rules

...and more to come

# Final Rule: Ownership and Control of Service-Disabled Veteran-Owned Small Business Concerns

83 FR 48908

- Common definition of ownership and control for SDVOSBCs across government-wide (including DOD) program and VA program
- VA determines eligibility for VA program
- Rule eases requirement that service-disabled vet make *all* decisions
  - Defines “extraordinary circumstances” in which non-SDV can have shared decision making authority
  - Control can shift when veteran is called to active duty
- If service-disabled veteran rated at 100 percent, surviving spouse can own and control for up to 10 years after veteran’s death

# Final Action: Waiver of the Nonmanufacturer Rule for positive airway pressure devices

83 FR 24919

- Covers
  - Continuous Positive Airway Pressure (CPAP) devices,
  - Bi-level Positive Airway Pressure (BiPAP) devices, and
  - other products intended to treat sleep apnea by keeping a person's airways open during sleep.
- In NAICS codes 339112 (surgical and medical instrument manufacturing) and 339113 (surgical appliance and supplies manufacturing), and PSC 6515.
- For the covered items, allows dealers to supply the product of any manufacturer on set-aside contract or order

# Final Action: Size Standard Methodology (2019)

[84 FR 14587](#)

- To be used for next SBA five-year review of size standards
- Moves from an “anchor” approach to a “percentile” approach for evaluating industry characteristics
- Assigns a separate size standard for each NAICS industry instead of selecting a size standard from a limited number of fixed size standards
- Lowers the threshold for selecting industries for the evaluation of the Federal contracting factor to \$20 million in annual Federal contracting dollars from the \$100 million threshold previously
- Applies the 4-firm concentration ratio to all industries, as opposed to using it only when the ratio is 40% or more previously

# Final Action: SBIR/STTR Policy Directive

[84 FR 12794](#)

- Combines SBIR and STTR policy directives into one document
- **Data rights:** minimum 20-year data rights protection period that starts from the date of award, government purpose rights after the protection period.
- **Obligations:** require Participating Agencies to “obligate” rather than “spend” the minimum percentage of extramural research, research and development (R/R&D) for the SBIR/STTR Programs.
- **Phase III preference:** Participating Agency must document whether it is the practical (to the greatest extent) to pursue a phase III SBIR/STTR award. If it is not practical, this must be documented in the file with a rationale provided to SBA.
  - must first consider a direct Phase III award and show how a preference was provided to the SBIR/STTR awardee.
- **Eligibility Requirements:** Allow participation by tribally-owned entities.

# Proposed Rule: HUBZone Comprehensive Review

83 FR 54812

- Proposed to define “*attempt to maintain*” HUBZone status during HUBZone contract performance as having at least 20% HUBZone employees (must be 35% at application and offer) and recruiting HUBZone employees.
- Proposed to include affiliate employees if no clear line of fracture between firms
- Proposed to move to annual recertification (from three-year), which would be effective for all HUBZone contracts for the one year period unless there is a merger or acquisition

# Proposed Rule: HUBZone Comprehensive Review (cont)

83 FR 54812

- Proposed to require HUBZone status in DSBS at time of offer (not necessarily time of award)
- Proposed 35% employee residency at time of certification or recertification; *attempt to maintain* during contract performance
- For non-HUBZone multiple-award contract, proposed that firm must be certified as a HUBZone at time of offer on a HUBZone set-aside order
- An employee who resides in a HUBZone continues to count as HUBZone employee as long as an employee of the firm—even if employees moves or residence no longer qualifies

# Proposed Rule: NDAA FY16/17 & RISE Act

83 FR 54812

- Proposed to allow COs to request information in connection with a contractor's compliance with applicable limitations on subcontracting (LOS) clauses
- Proposed exceptions to the LOS for
  1. airline travel,
  2. work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910),
  3. cloud computing services,
  4. mass media purchases, and
  5. work performed by an independent contractor under a contract that was awarded pursuant to the Foreign Assistance Act of 1961.
- Proposed to require a prime contractor with a commercial subcontracting plan to include indirect costs in its subcontracting goals
- Proposed to clarify status recertification in 8(a) and socioeconomic programs
- Limit the scope of Procurement Center Representative reviews of Department of Defense acquisitions performed outside of the United States and its territories
- Double scorecard credit for local area small business set asides in connection with a disaster.



# Proposed Rule: NDAA FY16/17 & RISE Act (cont.)

83 FR 54812

Proposed examples of failure to make a good faith effort to comply with a subcontracting plan

- A. Failure to submit in eSRS by the report due dates;
- B. Failure to pay small business concern subcontractors in accordance with terms;
- C. Failure to designate and maintain an official to administer the subcontracting program;
- D. Failure to demonstrate procedures adopted to comply with plan (e.g., flow-down clauses);
- E. Adoption of policies that have **as their objectives the frustration of the objectives of the plan**;
- F. Failure to correct substantiated findings from compliance reviews or participate in training;
- G. Failure to conduct market research identifying potential small subcontractors;
- H. Failure to **obtain approval by the CO to change small subcontractors** used in offers;  
or
- I. Falsifying records of subcontracting awards to SBCs.

# Proposed Rule: WOSB Certification Program

84 FR 21256

- Proposed to implement a **free** certification program for Women-Owned Small Businesses (WOSBs) and Economically-Disadvantaged Women-Owned Small Businesses (EDWOSBs) and eliminate the self-certification option to comply with 2015 NDAA amendment that requires a WOSB/EDWOSB to be certified by SBA, an authorized Federal or state entity, or an authorized third-party certifier (TPC) in order to be awarded WOSB/EDWOSB set-aside or sole source contracts.
- Proposed to expand the list of Federal and state entities that will be authorized to certify WOSBs/EDWOSBs in lieu of certification by SBA's Women-Owned Small Business Program office. These include the 8(a) Business Development Program and the HUBZone Program, the DOT Disadvantaged Business Enterprise Program, and the VA Center for Verification and Evaluation.
- Proposed detailed information about how SBA will oversee TPCs.

# Proposed Rule: WOSB Certification Program (cont)

84 FR 21256

- Proposed to adopt a \$750,000 net worth standard when assessing economic disadvantage for EDWOSBs and continuing eligibility for the 8(a) Business Development Program in order to ensure consistency between SBA's programs.
- Proposed to outline steps for requesting reconsideration for initial decline decisions, similarly to the 8(a) Business Development Program.
- Proposed procedures for how WOSBs/EDWOSBs will maintain certification and how SBA will conduct program examinations.

# Upcoming SBA proposed rules

1. Small Business Size Standards: Services, Agricultural, Construction, Transportation, Manufacturing
2. Consolidation of Mentor Protégé Programs and Other Government Contracting Amendments
3. HUBZone Program Provisions for Governor-Designated Covered Areas and Restoring Lost Certifications
4. Calculation of Annual Average Receipts
5. Regulatory Reform Initiative

# Deviations & Open FAR cases

# Deviations for Small Business Contracting

- DOD Class Deviation 2018-00018—Micro-Purchase Threshold, Simplified Acquisition Threshold, and Special Emergency Procurement Authority – adjusts thresholds for set-asides and other purposes
- DOD Class Deviation 2019-00003 – Limitations on Subcontracting for Small Business – substitutes SBA’s 2016 LOS rule
- DOD Class Deviation 2019-00005—Small Business Subcontract Reporting – use SF 294 instead of ESRS for orders from BOAs and BPAs

## Deviations for Small Business Contracting (cont.)

- CAAC Letter 2019-01, Class Deviation From the Federal Acquisition Regulation Regarding Limitations on Subcontracting for Small Business Concerns - substitutes SBA's 2016 LOS rule
- CAAC Letter 2018-02, Class Deviation from the Federal Acquisition Regulation (FAR) Increasing the Micro-Purchase Threshold and the Simplified Acquisition Threshold – adjusts set-aside thresholds

**CAAC Letters are not automatically adopted by civilian agencies as deviations.** They are allowed, but it does not require it.

## Open FAR Cases – Proposed Rule Stage

- FAR Case 2016-002, Applicability of Small Business Regulations Outside the United States
- FAR Case 2016-011, Revision of Limitations on Subcontracting
- FAR Case 2017-019, Policy on Joint Ventures
- FAR Case 2018-003, Credit for Lower-Tier Small Business Subcontracting

## Open FAR Cases – Final Rule Stage

- FAR Case 2014-002; Set-Asides Under Multiple Award Contracts



# Other Notable Actions

# OMB Category Management Memo

## Memorandum M-19-13

- Provides guidance to agencies on implementing category management (CM).
- Agencies are expected to take five actions:
  1. Create annual goals to successfully implement CM, consistent with small business and socioeconomic requirements,
  2. Develop plans to engage with industry and improve vendor relationships,
  3. Strengthen demand management plans to avoid wasteful spending,
  4. Share prices-paid and other related data to improve government buying, and
  5. Train employees in CM principles and practices.
- **Emphasizes that agencies must implement category management consistent with small business and socio-economic goals.**
- Footnote 31 (pg. 28): **“agencies could not migrate work that would cause the agency to violate small business program requirements, such as taking away work from a contractor under the section 8(a) business development program without seeking release from SBA.”**

# Section 809 Panel Volume III

## Volume III report

- Section 809 Advisory Panel established by Congress in the FY 2016 NDAA to make **recommendations** on streamlining acquisition regulations
- Small Business Recommendations:
  1. Recommends exempting DOD from small business set-aside requirements where the products being purchased are readily available or readily available with customization
  2. Recommends replacing those DOD set-asides with a 5% price preference for small business.
  3. Recommends release from the 8(a) program if a response is not received from SBA within 15 business days
  4. Recommends commercial item preference takes precedence over the small business rule of two. *Analytical Graphics, Inc. v. U.S.*, 135 Fed. Cl. 378 (2017)

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