

BRIEFING PAPERS[®] SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Small Business Participation In Government Contracts: Why It's Important, How To Qualify, Benefits To Enjoy, And Traps To Avoid

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In fiscal year 2019, federal agencies awarded \$132.9 billion in contracts to small businesses.¹ This is a reflection of policy goals, as Congress and federal agencies have long worked to provide business opportunities to small business concerns through federal contracts and subcontracts. The Federal Government does this through specialized small business contracting programs, some of which are further targeted to assist specific subgroups—women, veterans, the economically disadvantaged—that the Government wants to support through its procurement practices.

The process of qualifying for these small business contract programs and of obtaining contracts reserved for small businesses can be somewhat complex. A maze of rules, including the Federal Acquisition Regulation (FAR), FAR contract clauses, and Small Business Administration (SBA) regulations and decisions, as well as SBA standard operating procedures and informal guidance are involved.

This BRIEFING PAPER is designed to help you to understand the small business contracting process and to become familiar with specific small business programs including the SBA's 8(a) business development program for disadvantaged concerns, the veteran-owned small business (VOSB) and service-disabled veteran-owned small business (SDVOSB) programs, the women-owned small business (WOSB) and economically disadvantaged women-owned small business (EDWOSB) programs, and the Historically Underutilized Business Zone (HUBZone) program. In addition, we will provide a brief overview of some of the regulatory issues small businesses must navigate and highlight the benefits (and potential downsides) of small business contracting.

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Small Business Programs Generally

In establishing the Small Business Act,² Congress recognized the importance of small businesses in our competitive economy and announced its intent to “aid, counsel, assist, and protect, insofar as is possible, the interest of small-business concerns.”³ The legislation was designed to ensure that some portion of the total Government purchases of goods and services be placed with small-business enterprises, which Congress thought necessary “to maintain and strengthen the overall economy of the Nation.”⁴

General Eligibility Requirements

Per SBA regulations, a small business must be organized for profit, with a place of business located in the United States, and must either operate primarily within the United States or otherwise “make[] a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.”⁵ In addition, the company must be considered “small.”

Whether or not a company is considered small is based on specific size standards, which can be found in SBA regulations at 13 C.F.R. Part 121. Size status is measured based on the economic sector into which your business falls. Businesses are categorized using the North American Industry Classification System (NAICS) code or codes that best match the nature of the company’s business.⁶ The SBA has established a size standard for each NAICS code that is based either on average annual receipts⁷ or on the average number of employees.⁸ These size definitions and ceilings vary from industry to industry to reflect different conceptions of what is considered “small” in any given business sector. For example, an automotive repair company (NAICS Code 811111) is

considered small with \$8 million in average annual receipts, while a new home builder (NAICS Code 236117) is small with \$39.5 million in average annual receipts.⁹ Similarly, a wholesaler of fruits and vegetables (NAICS Code 424480) is small if it has under 100 employees on a 12-month average basis, while an aircraft manufacturer (NAICS Code 336411) is small at under 1,500 employees over the same period.¹⁰

Government purchasers assign a NAICS code to each particular procurement, and companies wishing to compete as a small business for that contract must fall within the applicable size standard for that designated NAICS code.¹¹ Note that for some specialized programs, such as the Small Business Innovation Research Program, the size standards are different.¹²

So how do you go about calculating eligibility based on revenues or number of employees? For revenue-based NAICS codes, recent changes to the small business size standards have increased the calculation time period for average annual receipts from three years to five years.¹³ The final rule implementing this change went into effect January 6, 2020, and provides for a transition period through January 6, 2022.¹⁴ For proposals submitted prior to January 6, 2022, then, you may select either a three-year period or a five-year period to calculate your average annual revenues.¹⁵ Employee-based calculations are not impacted by this rule. Where a size standard is based on the number of employees, that number is calculated based upon an annual average, by considering the average number of employees for each of the pay periods for the preceding 12 calendar months.¹⁶

Affiliation

When calculating size status, companies must count

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not only their own employees and revenues, but also must take into account any “affiliates” as that term is defined in the SBA regulations. In other words, the regulations specify “the maximum allowed for a concern *and its affiliates* to be considered small.”¹⁷ Small businesses thus must aggregate the revenues and/or employees (as relevant for their NAICS code) of all affiliates with those of the company itself to ensure that they remain below the maximum number of employees or annual receipts to remain eligible for small business contract awards.

The rules pertaining to what constitutes an affiliate are set forth in 13 C.F.R. § 121.103. Affiliation can take many forms, including common ownership, common management, familial or contractual relationships, extensive business dealings, and investment control.¹⁸ Because it is sometimes difficult to determine whether or not another concern may be considered an affiliate, and because the SBA rules on affiliation have been extensively interpreted by SBA case law, if you are uncertain whether or not affiliation may apply, you should contact legal counsel for additional guidance. As described below, failure to properly calculate size status, including failure to take affiliation into account, can have significant adverse consequences.

Small Business Set-Aside Contracts

Contracting officers are encouraged to offer certain types of contracts exclusively for small businesses (i.e., to “set aside” the contract for only small businesses) and/or to give preference to small businesses in the award process. There are several types of set-asides. Some are open to all small businesses, while others are only open to the special categories of small businesses discussed below. Whether a particular contract is set aside for small businesses largely depends on the anticipated value of the procurement and the “rule of two.” The “rule of two” involves consideration of whether the contracting officer has a reasonable expectation of obtaining offers from two or more responsible small business concerns “that are competitive in terms of fair market prices, quality, and delivery.”¹⁹

Small business set-asides do not have to pertain to an entire procurement; they can be partial. A contracting officer must set aside a portion or portions of an acquisition (except for construction) for exclusive small business

participation when market research indicates that a total set-aside is not appropriate but the requirement can be divided into distinct portions and two or more responsible small business concerns are reasonably expected to submit offers on the set-aside portion of the work.²⁰

Additionally, the FAR requires contracting officers to set aside contracts for special categories of small businesses under some circumstances. For contracts over \$250,000, Government contracting officers are to initially consider using one of the small business socioeconomic contracting programs (e.g., 8(a), HUBZone, SDVOSB, or WOSB programs) before considering a general small business set-aside.²¹

General Small Business Eligibility

While the rules for special categories of small businesses can differ, a company competing as a general small business may self-certify that it is small.²² To do so, a company must represent in good faith that (1) it meets the small business size standard corresponding to the NAICS code identified in the solicitation, and (2) the SBA has not issued a written determination finding the company other than small.²³ Representations as to size status are made at the time of initial offer for most programs.²⁴ The contracting officer must accept an offeror’s size representation unless (1) another offeror or interested party challenges the concern’s small business representation, or (2) the contracting officer has a reason to question the representation.²⁵ Any size representation challenge must be referred to the SBA,²⁶ which will then evaluate whether a company qualifies as a small business.²⁷ (More on SBA size protests below.)

Special Categories Of Small Business Programs

As mentioned, certain types of small businesses are given preferential treatment by the Federal Government, and contracting officers are encouraged to consider an acquisition for one of these small business socioeconomic contracting programs before considering a general small business set-aside.²⁸ To qualify for these socioeconomic programs, a business must first be a small business. The SBA can then consider the business’ ownership and geography for eligibility in other programs. The most common small business socioeconomic contracting programs

discussed in this PAPER are the SBA's 8(a) business development program for socially and economically disadvantaged businesses, the VOSB and SDVOSB programs, the WOSB and EDWOSB programs, and the HUBZone program.

Congress has established Government-wide procurement contracting goals based on both small businesses generally and these specific sub-categories of small businesses and measures agency performance against these goals. The small business contracting goals for each agency are:

- At least 23% of the total value of all prime contract awards to small businesses;
- 5% of the total value of all prime contract awards and subcontract awards to small socially and economically disadvantaged businesses (8(a) businesses);
- 5% of the total value of all prime contract awards and subcontract awards to service-disabled veteran-owned small businesses;
- 5% of the total value of all prime contract awards and subcontract awards to women-owned small businesses; and
- 3% of the total value of all prime contract awards and subcontract awards to HUBZone small businesses for each fiscal year.²⁹

The SBA tracks agencies' performance against these small business participation goals and presents the results in the SBA's annual Small Business Procurement Scorecards.³⁰ In fiscal year 2019, federal agencies awarded \$132.9 billion in contracts to small business, which represented 26.5% of federal contracting dollars, 3.5% higher than the Government's statutory target.³¹

The Section 8(a) Program

Section 8(a) of the Small Business Act, 15 U.S.C.A. § 637, commonly referred to as the "8(a) program," authorizes the SBA to enter into agreements with other agencies to encourage award of contracts to firms eligible for program participation.³² Contracts may be awarded to 8(a) program participants on a sole-source or competitive basis.³³ The 8(a) program is designed to assist companies

that are owned and controlled by socially and economically disadvantaged individuals "so that such concerns can compete on an equal basis in the American economy," and to provide these companies the tools necessary to succeed.³⁴

In fiscal year 2019, 8(a) participants were awarded \$30.4 billion in federal contracts, including \$8.6 billion in 8(a) set-aside awards and \$9.9 billion in 8(a) sole-source awards.³⁵

To be eligible for the 8(a) program, a company must meet the following criteria:

- The firm must qualify as a small business concern under the applicable size standard for its NAICS code;³⁶
- The firm must be at least 51% unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States (except for concerns owned by Native American tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations);³⁷ and
- The firm must demonstrate a potential for success.³⁸

Ownership is considered "unconditional" when it is not subject to any conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements that could cause the benefits of ownership to go to another entity.³⁹ Ownership is direct when the disadvantaged individual or individuals own the business in their own right and not through an intermediary, such as another business or by a trust (including employee stock ownership trusts).⁴⁰

In addition to these requirements, a disadvantaged individual must hold the highest officer position (usually president or chief executive officer) within the business.⁴¹ The 8(a) company's business and daily business operations must be conducted on a full-time basis by one or more disadvantaged individuals who have "managerial experience of the extent and complexity needed to run the concern."⁴²

To maintain 8(a) status, the same disadvantaged ap-

plicant or applicants that were part of the initial 8(a) application must maintain 51% or more of the ownership and control.⁴³ Ownership cannot simply be transferred to another disadvantaged individual.⁴⁴ However, “[a]ny Participant that was awarded one or more 8(a) contracts may substitute one disadvantaged individual for another disadvantaged individual without requiring the termination of those contracts or a request for waiver under [13 C.F.R.] § 124.515, as long as it receives SBA’s approval prior to the change.”⁴⁵

Who exactly is considered “disadvantaged” for purposes of the 8(a) program? Generally, “[s]ocially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities.”⁴⁶ Members of designated racial and ethnic groups are presumed to be socially disadvantaged.⁴⁷ Individuals who are not members of one of these designated groups may qualify for participation, but they “must establish individual social disadvantage by a preponderance of the evidence.”⁴⁸

“Economically disadvantaged individuals” are those that have historically had limited access to capital and credit.⁴⁹ Generally, to qualify as “economically disadvantaged,” the net worth of an individual must be less than \$750,000.⁵⁰ The SBA will presume that an individual is not economically disadvantaged if his or her adjusted gross income averaged over the past three years exceeds \$350,000.⁵¹ Furthermore, an individual will generally not be considered economically disadvantaged if the fair market value of all of his or her assets (including his or her primary residence and the value of the 8(a) applicant/participant firm) exceeds \$6 million.⁵² If the applicant is married, his or her spouse’s assets are also considered.⁵³

In determining whether an applicant has “good character,” the SBA considers (and may use as a basis for disqualification) any possible criminal conduct by the applicant, violations of SBA regulations, debarment or suspension from Government contracting, evidence of a lack of business integrity on the part of a manager or key employee, current incarceration, parole, or probation for a felony or any crime involving business integrity, and the knowing submission of false information to the SBA.⁵⁴

For a firm to demonstrate “potential for success,” it generally must be in business for at least two full years immediately prior to the date of its 8(a) application.⁵⁵ The SBA may waive the two-year requirement if the following conditions are met: (1) the disadvantaged individual upon whom eligibility is based has substantial business management experience; (2) the applicant has demonstrated technical experience and a sound business plan; (3) the applicant has adequate capital to sustain its operations and carry out its business plan; (4) the applicant has a record of successful performance on prior contracts within its business category; and (5) the applicant has or can show that it will have, the personnel, facilities, equipment, and any other resources needed to perform 8(a) contracts.⁵⁶ A successful applicant must demonstrate both technical knowledge in its primary industry category and management experience sufficient to run its day-to-day operations.⁵⁷ Furthermore, the applicant, or its employees, must hold all necessary professional licensing for its primary industry.⁵⁸

The 8(a) applicant cannot self-certify as a participant in the program. Instead, they must submit an application and be approved by the SBA to be admitted to the program. Applicants can request admission to the 8(a) program via an electronic application available on the SBA’s website.⁵⁹ A complete application must include significant amounts of documentation, including financial statements, copies of filed federal personal and business tax returns, individual and business bank statements, personal history statements, and any additional documents the SBA deems necessary to determine eligibility.⁶⁰ Generally, the SBA will advise applicants within 15 days after the receipt of an application whether the application is complete and suitable for evaluation and, if not, what additional information or clarification is required to complete the application.⁶¹ The SBA will process an 8(a) program application within 90 days of receipt of a complete application package.⁶²

To retain eligibility to participate in the 8(a) small business program after certification, a firm must generally remain small for its primary industry classification and must continue to meet all eligibility criteria contained in 13 C.F.R. § 124.101 through § 124.108.⁶³ Companies may remain part of the 8(a) program for nine years.⁶⁴ After that they “graduate” from their 8(a) status, although they may still be considered small businesses if they

otherwise remain eligible. The SBA may graduate an 8(a) participant early if the firm exceeds the size standard corresponding to its primary NAICS code for three consecutive years.⁶⁵

Participation in the 8(a) program includes as a major advantage the ability of companies to compete for contracts set aside specifically for 8(a) contractors.⁶⁶ These contracts may be competed where at least two 8(a) participants are expected to submit proposals or may be awarded on a sole-source basis.⁶⁷

Veteran-Owned Small Businesses Programs

Congress has authorized unique benefits to small businesses owned by military veterans, including the opportunity to compete for certain set-aside procurements. Both SDVOSBs and, to a more limited extent, VOSBs are eligible for preferences in Government procurements through two programs designed by Congress—the SDVOSB Procurement Program (the SBA refers to the program as the Service-Disabled Veteran-Owned (SDVO) Small Business Concern (SBC) program⁶⁸) and the Veterans First Contracting Program.

Because “the United States ha[d] done too little to assist veterans, particularly service-disabled veterans, in playing a greater role in the economy,”⁶⁹ Congress first aimed to assist veterans in 1999 by expanding the eligibility for certain small business assistance programs to include veterans, directing certain federal agencies to enhance small business assistance to VOSBs and SDVOSBs, and establishing new institutions to provide small business assistance to veterans or to support the institutions that provide such assistance.⁷⁰ Subsequently, Congress enacted the Veterans Benefits Act of 2003, which amended the Small Business Act to allow contracting officers to award sole-source and set-aside contracts to SDVOSBs.⁷¹

Under these authorities, a Government agency can restrict competition to only SDVOSBs if it determines that at least two SDVOSBs will submit offers at a fair market price.⁷² An agency can award a sole-source contract to an SDVOSB if it expects only one qualified SDVOSB to submit an offer, the anticipated award price of the contract will not exceed the sole-source limit (currently, \$4 million or \$6.5 million for manufacturing contracts⁷³), and the contract award can be made at a fair and reasonable price.⁷⁴

In 2004, President George W. Bush also issued Executive Order 13360 to increase federal contracting and subcontracting opportunities for SDVOSBs.⁷⁵ The Order required each federal agency to develop a strategy to increase contracting and subcontracting with SDVOSBs, designate a senior-level official to be responsible for developing and implementing the agency’s strategy, and report its progress annually to the SBA.⁷⁶ Specifically, the Order directed the Administrator of General Services to “establish a Government-Wide Acquisition Contract reserved for participation by service-disabled veteran businesses” and “assist service-disabled veteran businesses to be included in Federal Supply Schedules.”⁷⁷ In response, the General Services Administration (GSA) created the Veterans Technology Services (VETS) Governmentwide Acquisition Contract (GWAC), an IT services set-aside contract reserved exclusively for SDVOSBs.⁷⁸ A successor contract, Veterans Technology Services 2 or “VETS 2,” enables the GSA to continue its support of the SDVOSB Procurement Program, while helping federal agencies achieve their socioeconomic objectives.⁷⁹

Today, the SBA administers the SDVOSB program and assists federal agencies in meeting agency goals for the program, finding SDVOSB firms through the small business database, overseeing SDVOSB contract challenges, and determining which contract vehicles are most appropriate for the agency’s needs.⁸⁰ Consistent with the applicable statutes and the SBA’s regulations under the SDVOSB program, contracting officers may award contracts using either sole-source or set-aside procedures, although they must consider set-aside contract vehicles first.⁸¹

In addition to this SBA-run program for all federal agencies, the Department of Veterans Affairs (VA) has its own veterans’ business program through which it buys goods and services from veteran-owned companies. Under the authority of the Veterans Benefits, Health Care, and Information Technology Act of 2006, the VA created the Veterans First Contracting Program to increase veteran participation in Government procurement.⁸² The program allows the VA to grant SDVOSBs and VOSBs preference in VA procurements for set-aside and sole-source contracts.⁸³ Under the Veterans First Contracting Program, the VA is required to determine whether there are at least two VOSBs or SDVOSBs that could submit

offers for an acquisition at a fair and reasonable price.⁸⁴ If so, the VA must set-aside the procurement for SDVOSBs or VOSBs,⁸⁵ with priority given to SDVOSBs.⁸⁶ In 2016, the U.S. Supreme Court confirmed the priority of this “rule of two” approach and the prioritization of VOSBs and SDVOSBs over all other types of set asides in *Kingdomware Technologies, Inc. v. United States*.⁸⁷

Notably, the Veterans First program sets higher procurement goals than the SDVOSB program. The VA’s fiscal year 2019 prime contracting goals for the Veterans First program were 17.0% for VOSBs and 15.0% for SDVOSBs, compared to the fiscal year 2019 goal for the SDVOSB Procurement Program of 3%.⁸⁸

With that overview of the veterans’ small business programs, let’s take a look at eligibility requirements for SDVOSBs and VOSBs. Historically, the SBA and VA each applied their own eligibility requirements for their respective programs (the SBA’s SDVOSB Procurement Program or the VA’s Veterans First Contracting Program). However, in 2016 Congress directed the SBA and VA to consolidate their certification programs to ensure uniformity in SDVOSB regulations.⁸⁹ In 2018, the SBA and the VA issued new regulations for the SDVOSB and VOSB certification processes.⁹⁰ The VA continues to make determinations about applicant firms to certify SDVOSBs and VOSBs for VA contracts, but now applies the SBA’s definitions of control and ownership in connection with its certification analysis.⁹¹

To compete for Government contracts as a SDVOSB or VOSB, firms generally must:

- Be a small business;
- Be at least 51% owned and controlled by one or more veterans; and
- Have one or more veterans manage day-to-day operations and also make long-term decisions.⁹²

SDVOSBs must be owned by a veteran with a service-connected disability (as that term is defined by the VA⁹³), who also has day-to-day control over operations and long-term decisionmaking.⁹⁴

The terms “veteran” and “service-disabled veteran” are defined by statute as a person who served in the ac-

tive military, naval, or air service and who was discharged or released under conditions other than a dishonorable discharge.⁹⁵ A service-disabled veteran must have suffered a disability that is “service-connected,” such that the disability was incurred or aggravated in the line of duty in the active military, naval, or air service.⁹⁶

As noted, under SBA regulations, a VOSB or SDVOSB must be “at least 51% unconditionally and directly owned by one or more [veterans or service-disabled veterans].”⁹⁷ “Unconditionally” in this context means that the veteran’s ownership cannot be subject to any restrictions and directly means that the veteran must own the company outright as socioeconomic status does not “trickle down” through corporate structures such as parent, affiliate, or subsidiary forms. For publicly owned businesses, no less than 51% of the stock must be owned by one or more veterans.⁹⁸ For partnerships, at least 51% of aggregate voting interest must be unconditionally owned by one or more veterans or service-disabled veterans, and in general one or more veterans must receive at least 51% of the annual distribution of profits paid to owners of the corporation, partnership, etc.⁹⁹

To qualify as veteran-controlled, both long-term and day-to-day management and administration of business operations must be conducted by one or more veterans (or service-disabled veterans depending on the program).¹⁰⁰ A veteran (or service-disabled veteran) also must hold the highest officer position (e.g., president, chief executive officer) in the company and must have the managerial experience necessary to run the company. The veteran (or service-disabled veteran) does not need to have technical experience or required licenses but does need “ultimate managerial and supervisory control” over employees who possess the technical expertise or required license.¹⁰¹

Other circumstances and factors that indicate whether a veteran does or does not control a business include whether the veteran:

- Controls the board of directors;
- Has the capacity to overcome a super majority;
- Works normal business hours;
- Lives in close proximity to firm headquarters; and
- Receives the highest compensation.¹⁰²

The SBA will not find that a veteran or service-disabled veteran lacks control where he or she does not have the unilateral power and authority to make decisions in “extraordinary circumstances.”¹⁰³ However, this exception is narrow and only applies to five extraordinary circumstances: (1) adding a new equity stakeholder; (2) dissolution of the company; (3) sale of the company; (4) the merger of the company; and (5) the company declaring bankruptcy.¹⁰⁴

Whether a VOSBs or SDVOSBs can self-certify or must obtain formal certification through the VA depends on which program(s) the company plans to participate in. If a company intends only to participate in the SDVOSB Procurement Program (i.e., any program outside the VA), then it can self-certify.¹⁰⁵ However, if a company wants to compete in the Veterans First Contracting Program (i.e., the VA’s program) then it will need to certify through the VA Center for Verification and Evaluation (CVE).

VA CVE applicants must complete online Vendor Information Pages (VIP) database forms, submit required supplemental documentation, and have the information verified by the VA CVE.¹⁰⁶ CVE is authorized to approve or deny applications for VIP verification and may request additional information relating to eligibility at any time in the application process.¹⁰⁷ Once approved, a participant retains its eligibility for three years from the date of CVE’s approval letter establishing verified status.¹⁰⁸ However, participants must inform CVE of any changes that may affect its eligibility,¹⁰⁹ and CVE can initiate a verification examination based on credible information it receives concerning a participant’s eligibility (or lack thereof).¹¹⁰

Woman-Owned Small Business Programs

In 1994, Congress established a goal for the Federal Government that no less than 5% of the total value of federal contracts be awarded to small businesses owned and controlled by women (WOSBs).¹¹¹ The current version of the WOSB program was authorized by the Small Business Reauthorization Act of 2000, which was incorporated by reference in the Consolidated Appropriations Act, 2001.¹¹² To help agencies achieve the 5% goal, the program was designed to give contracting officers the power to restrict competition for certain Government contracts solely to WOSBs.¹¹³

Notwithstanding this congressional direction, the SBA took several years, until 2010, to issue the implementing regulations for the WOSB program.¹¹⁴ Contracting officers can now restrict competition to WOSBs or EDWOSBs and/or can award sole-source contracts to these companies.¹¹⁵ These restrictions are limited, however, to industries where the SBA has determined that WOSBs are underrepresented.¹¹⁶ As with other types of small business awards, sole-source awards are permitted as long as two requirements are met: (1) the contracting officer does not have a reasonable expectation that two or more businesses will submit offers; and (2) the anticipated award price will not exceed \$7 million for manufacturing contracts or \$4.5 million for all other contracts.¹¹⁷

To be considered a WOSB, a company must meet certain criteria, including qualifying as a small business and being 51% owned by one or more women who are U.S. citizens (or, if the firm is publicly owned, one or more women must own 51% of the firm’s stock).¹¹⁸ In addition, a woman must manage the daily operations of the firm, as well as be in control over all long-term and strategic business decisions.¹¹⁹

EDWOSBs have similar requirements as WOSBs, with the further caveat that the firm must be unconditionally and directly owned by one or more *economically disadvantaged* women.¹²⁰ Economic disadvantage is measured based on criteria similar to that discussed above in connection with the 8(a) program. As with that program:

- The owner’s net worth must be less than \$750,000;
- Her gross income must not have exceeded \$350,000 on average over the three preceding years; and
- The market value of all her assets (including a primary residence and the value of the EDWOSB entity) must not exceed \$6 million.¹²¹ A woman-owned business that is certified as an 8(a) program participant qualifies as an EDWOSB.¹²²

Previously, WOSBs and EDWOSBs self-certified as to their eligibility. However, Congress eliminated this option in 2015,¹²³ in response to federal audit findings of fraud and improper certifications.¹²⁴ The SBA has again taken a while to implement regulations, but effective this October 15, 2020, a new certification process will be

required for WOSBs and EDWOSBs competing for U.S. federal set-aside, sole-source, and multiple award contracts.¹²⁵ The new rule requires WOSBs and EDWOSBs to certify as to their status in one of three ways: (1) directly through the SBA, (2) through SBA-authorized third-party certifiers, or (3) through the VA's CVE.¹²⁶

The HUBZone Program

The HUBZone program “is a unique program that directs federal contract dollars to small businesses located in areas of high unemployment, low-income, Native American lands, and military bases closed under the Base Realignment and Closure Act in efforts to stimulate economic development.”¹²⁷ The primary objective of the HUBZone program is “job creation and increasing capital investment in distressed communities.”¹²⁸ The program provides “[f]ederal contracting assistance for qualified small business concerns located in historically underutilized business zones, in an effort to increase employment opportunities, investment, and economic development in those areas.”¹²⁹ Based on the statutory definitions of what constitutes a HUBZone,¹³⁰ the SBA uses census data and information from agencies including the Department of Housing and Urban Development to determine HUBZone designation status, and then produces a map identifying areas that fall within HUBZones.¹³¹ HUBZones are updated every five years.¹³²

As with the other programs, HUBZone small businesses are eligible for sole-source and set-aside contracts.¹³³ Certified HUBZone small businesses are also eligible for contract awards through full and open competition after a price evaluation preference is applied.¹³⁴ In fiscal year 2019, the Federal Government awarded \$11.5 billion to HUBZone-certified businesses.¹³⁵

To be designated a HUBZone business, a company must undergo a certification process through the SBA. To be eligible for HUBZone certification and to remain certified, a small business concern must:

- Meet the SBA small business standards for the firm's primary industry classification,¹³⁶
- Be at least 51% owned and controlled by one or more individuals who are U.S. citizens, a com-

munity development corporation, an agricultural cooperative, or a Native American tribe (including Alaska Native Corporations and Native Hawaiian Organizations);¹³⁷

- Maintain its principal office in a designated HUBZone (except for concerns owned in whole or in part by one or more Native American Tribal Governments);¹³⁸
- Ensure that at least 35% of its employees reside in a HUBZone;¹³⁹
- Certify at the time of application that it will “attempt to maintain” a level of at least 35% of its employees residing in a HUBZone during the performance of any HUBZone contract it receives;¹⁴⁰ and
- Certify at the time of application that it will comply with the applicable limitations on subcontracting requirements in connection with any procurement that it receives as a certified HUBZone small business concern.¹⁴¹

Small businesses must apply online to the SBA's HUBZone Program Office for HUBZone certification.¹⁴² If the SBA determines that a concern meets the requirements, it will issue a HUBZone small business certification and will add the concern to the List of Qualified HUBZone Small Business Concerns.¹⁴³ Only companies on this list are eligible for HUBZone preferences.¹⁴⁴

The SBA issued a final rule amending its regulations for the HUBZone program in November 2019.¹⁴⁵ In doing so, the SBA acknowledged that establishing a principal office in a HUBZone can be a significant investment for any business, especially small businesses, and that greater certainty regarding a firm's continued eligibility for the program would help encourage firms to invest in these areas for the long term.¹⁴⁶ SBA regulations now provide that if a small business owns or makes a long-term investment (i.e., a lease of at least 10 years) in a principal office in an area that qualifies as a HUBZone at the time of its initial certification, the company will be deemed to have its principal office located in a HUBZone for at least 10 years from the date of that certification as long as the firm maintains the long-term lease or continues to own the property.¹⁴⁷ This change protects companies from losing their HUBZone status if the area their principal office is located in is determined no longer to be a HUBZone.¹⁴⁸

The final rule also loosens the employee residence requirements so that if an employee lived in a HUBZone at the time of certification, the employee can continue to count as a HUBZone resident as long as the person lives in the HUBZone for at least 180 days immediately after certification and remains an employee of the concern, even if the employee subsequently moves outside the HUBZone or the area where the employee lives no longer qualifies as a HUBZone.¹⁴⁹ Finally, the rule clarifies that “attempt to maintain” requires “substantive and documented efforts” and that if a HUBZone business falls below 20% of its total employees residing in a HUBZone during the performance of a HUBZone contract, it will be deemed to have failed to “attempt to maintain” the HUBZone residency requirement.¹⁵⁰ If a concern falls below the 20% threshold during the year, it will be decertified.¹⁵¹

Benefits Of Small Business Status

As mentioned above, one of the primary benefits of being a small business, particularly one of the socioeconomic sub-varieties of small businesses, is the ability to receive set-aside and sole-source prime contract awards. These contracts are issued as an exception to, and outside the normal process of, full and open competition, which is generally required for Government procurements.¹⁵² Restricting procurements to small businesses, or certain sub-categories thereof, provides opportunities for smaller players in the market who have a better chance competing against similar sized peers as opposed to in an open procurement where large businesses have advantages of resources and scale. Even if a procurement is not set aside for small businesses, agencies still can count an award to a small business against their agency targets.

In addition to these prime opportunities, federal agencies require other-than-small prime contractors to offer subcontracts to small businesses wherever possible.¹⁵³ Indeed, these subcontracting opportunities under Government primes can be easier to obtain than direct prime awards, and they offer more flexibility in terms of contracting process and terms. Many large companies actively solicit small businesses, particularly in the various socioeconomic categories, through specialized fairs and activities, for inclusion on purchasing lists.

The SBA and other federal agencies also make many

resources available to small businesses. For example, 8(a) contractors are offered assistance in the form of “business counseling and mentoring, both in online and traditional face-to-face settings; access to capital and surety bond guarantees; contract marketing guidance; and assistance with acquiring federal government surplus property.”¹⁵⁴ Loan assistance is also available.¹⁵⁵

Small businesses also are eligible to team with and learn from experienced Government contractors through the SBA’s Mentor-Protégé program.¹⁵⁶ Mentor-protégé programs pair small businesses with larger, more experienced businesses in a mutually beneficial relationship.¹⁵⁷ By participating in these programs, mentors and protégés can form joint ventures that qualify for set-aside contracts for which the large business mentor would otherwise have been ineligible.¹⁵⁸ “A protégé and mentor may joint venture as a small business for any government prime contract, subcontract or sale, provided the protégé qualifies as small for the procurement or sale. Such a joint venture may seek any type of small business contract (i.e., small business set-aside, 8(a), HUBZone, SDVO, or WOSB) for which the protégé firm qualifies (e.g., a protégé firm that qualifies as a WOSB could seek a WOSB set-aside as a joint venture with its SBA-approved mentor).”¹⁵⁹ Under some programs, mentors also can fulfill socioeconomic program goals and receive reimbursement of certain expenses, and protégés can receive management, technical, and financial assistance such as loans or equity from mentors to perform federal contracts.¹⁶⁰

While the SBA does not play a role in matching mentors with protégés, their agreements must be approved by the SBA and the joint ventures must have a separate profile in SAM.gov, the online database of Government contractors.¹⁶¹ Both parties must also complete an online tutorial, prepare a business plan, and agree to the mentor-protégé agreement before participating in the program.¹⁶²

There are restrictions on the types of relationships mentors and protégés can have; a protégé may only have up to two mentors in their business lifetime.¹⁶³ The restrictions are loosened for mentors: they may have no more than three protégés *at a time*.¹⁶⁴ The term of a mentor-protégé relationship may not exceed six years in total.¹⁶⁵ Both parties must commit to the relationship and maintain the mentor-protégé relationship once the SBA

approves the agreement.¹⁶⁶ Finally, the joint venture protégé must perform at least 40% of work under contracts awarded to the joint venture.¹⁶⁷

Although these are benefits of small business programs generally, there are some unique benefits that only apply to specific subcategories of companies. Through the Veterans First Contracting Program, veterans take priority over all other groups, including the 8(a), HUBZone, and WOSB programs. The VA allows acquisitions to be set aside for competitions exclusively among VOSBs and SDVOSBs;¹⁶⁸ no other federal agency offers as direct a benefit to any other socioeconomic program. In addition, a unique benefit of being a qualified HUBZone small business concern is that a price evaluation preference of 10% is applied in assessing the business' proposal in acquisitions conducted using full and open competition.¹⁶⁹

Additional Considerations

Size Protests

For qualified companies, small business size status can open doors to many opportunities with the Federal Government. At the same time, loss of small business status poses a risk to a company's ongoing contracts and a larger risk to its future pursuits. Therefore, small business size status can be a contested issue.

An offeror, the SBA, or another interested party (such as the contracting officer) may protest a concern's small business size status.¹⁷⁰ Challenges to small business certifications are heard by the local SBA Government Contracting Area Office, and Area Office decisions are appealable to the SBA Office of Hearings and Appeals (OHA).¹⁷¹ The Government Accountability Office, which handles all other sorts of Government contracts protests, does not hear size protests.¹⁷²

If a company wants to contest an assertion that a competitor for a contract award is a qualified small business, it is important to be aware of the timeliness rules for protesting a small business representation. To be timely, a size protest must be received by the contracting officer by the close of business of the fifth business day after bid opening or your receipt of the contracting officer's notification identifying the apparently successful offeror.¹⁷³ If a size protest is successful, the company

found not to be small will not be eligible for any set-aside contracts.

M&A Transactions Involving Small Businesses

When a large business, or even another small business concern, is considering purchasing or merging with a company that has contracts that are set aside for small businesses, a number of considerations come into play. Generally, the most important of these is whether or not performance of those set-aside contracts can continue following the merger or acquisition activity. The acquisition itself and, indeed, even a letter of intent to enter into an acquisition, can create affiliations that change the small business size status of the company being acquired (and potentially the acquirer, if also a small business). Certain types of set-aside contracts may be able to continue post-acquisition even if the contractor is no longer small, but others may not. For example, contracts governed by the 8(a) program must be performed by the individual who initially received 8(a) certification, unless a waiver is granted.¹⁷⁴ Small business 8(a) set-aside contracts thus are not readily transferable. For other types of socioeconomic-based small business contracts, if the new owner does not meet the same eligibility criteria (women-owned, veteran, HUBZone, etc.) then it is possible for performance to continue, but the Government will no longer be able to obtain credit for participation in the program.¹⁷⁵ A change in size status also triggers various notification and recertification requirements, including those under the clause at FAR 52.219-28, "Post-Award Small Business Program Rerepresentation."¹⁷⁶ Finally, it is important for acquiring concerns to validate the size status representations of small businesses and to make sure that the target has complied with its small business-related contract requirements lest the acquirer take on through successor liability potential responsibility for false claims and improper misrepresentations. (More on this in the next section.)

For all these reasons, it is important that an acquiring entity understand the small business representations and the set-aside contract status of any company being acquired. Failure to vet and recognize small business issues may jeopardize contract eligibility or lead to contract terminations or the imposition of penalties and fines that defeat the goals of the acquisition.¹⁷⁷

Fraud & False Claims Act Liability

Although the vast majority of small businesses are honest and diligent, and do their best to comply with increasingly complicated rules, there are unfortunately some unscrupulous actors willing to game the system through fraud. Luckily, the Federal Government has investigators ready to target such wrongdoers, and it has a number of options available to punish those who would commit fraud to obtain set-aside contracts for which they are unqualified or who otherwise make misrepresentations in connection with performance of small business contracts. Occasionally, small business contractors investigated for fraud simply fail to understand the applicable rules. They, too, are sometimes the subject of investigations and litigation, but are generally judged less harshly than purposeful offenders. In this section we discuss the remedies available to the Government for small business-related improprieties.

The Small Business Jobs Act of 2010 established harsh penalties for misrepresentations of small business size status up to relinquishment of the entire contract price.¹⁷⁸ The Act created the so-called “presumed loss” rule for size status misrepresentation. Although misrepresentation of size status has always been punishable, the Small Business Jobs Act allows the Government to claim harm in the amount of the entire value of the contract(s) at issue when a contractor willfully misrepresents its size or status. Under 15 U.S.C.A. § 645(d), any person who misrepresents a firm’s status as a business concern that is small, HUBZone small, small disadvantaged (8(a)), SDVOSB, VOSB, EDWOSB, or WOSB in order to obtain a contract to be awarded under one of the small business preference programs, shall:

- Be punished by imposition of fine, imprisonment, or both;
- Be subject to administrative remedies, including suspension and debarment; and
- Be ineligible for participation in programs conducted under the authority of the Act.¹⁷⁹

SBA regulations¹⁸⁰ and other program-specific regulations¹⁸¹ for each of the various small business programs further implement these punishments for misrepresentation.

In addition to this potential statutory liability, misrep-

resentation of size status can lead to significant damages and penalties under the civil False Claims Act.¹⁸² Under the civil False Claims Act, any misstatement or misrepresentation made to the Government in connection with a claim for payment under a contract, including, for example, misrepresentation of size status, or of eligibility for particular small business programs, can lead to a significant penalty per invoice (currently ranging from \$22,363 to \$23,331), plus up to treble damages on the total value of the contract.¹⁸³ Truly intentional fraud against the Government is also punishable under the criminal False Claims Act,¹⁸⁴ where punishment can include not only fines, but also jail time.

There have been dozens of reported False Claims Act cases in which a company either misrepresented that it was small when it in fact did not qualify as such under the applicable regulations, or claimed eligibility for a socio-economic preference for which it was not eligible, or failed to inform the Government when it grew other than small or otherwise became ineligible for preferred status or set-aside contracts. Some of these cases go to trial, although many are resolved through settlement with the Department of Justice.

For example, in one case that resulted in criminal guilty pleas, a small business and a large business were alleged to have colluded to have the small business obtain over \$70 million in 8(a) set-aside contracts, yet had the large business perform all of the work.¹⁸⁵ In another case,¹⁸⁶ a company claimed to be a WOSB, but the complaint, which included False Claims Act counts, alleged that the two women who were the supposed majority owners of the company did not have offices or email addresses at the company and never attended meetings or otherwise spent time in the office. Instead, the husband of one of the women ran the day-to-day operations. Yet another example of small business fraud involved a situation where a company alleged represented that its principal office was in a HUBZone designated area when it only maintained a “virtual office” in the designated area where no employees worked.¹⁸⁷ In an unusual False Claims Act settlement, the company and its owner agreed to pay \$250,000 plus to give the Government 5% of its gross revenues for the next five years.¹⁸⁸ A final example involved an alleged decades-long scheme by two construction companies to fraudulently obtain more than \$50 million in contracts set aside for SDVOSBs and HUB-

Zone businesses.¹⁸⁹ In this case a large business was effectively controlling all of the work, and the parties used various schemes to hide the affiliation.

Finally, many times issues around improper small business certification or lack of qualification come up in the context of size protests at the SBA OHA. Recently, for example, a contractor was found not to be qualified as an SDVOSB because the veteran owner worked full time for another company and therefore could not be said to have day-to-day control of the contractor awardee.¹⁹⁰ Similarly, a contractor was recently disqualified from participation in the 8(a) program because its owner had other outside employment.¹⁹¹ Notably, losing a size or status protest does not necessarily mean that an entity has submitted a false claim; in many instances, the company simply is not aware of the complex rules that apply to small business status.

In sum, the Government has various remedies available to combat misrepresentations on the part of small businesses in connection with their eligibility for set aside government contracts or other advantages based on small business categories. It is very important therefore that companies take certification obligations very seriously so as to not face significant liability.

Guidelines

The following *Guidelines* are suggestions for firms to follow in order to obtain certification as one of the various categories of small businesses and to pursue opportunities for federal government small business contracts. These *Guidelines* cannot replace professional representation, but they are a good starting point for companies new to the world of small business government contracting.

1. Before applying for certification or self-certifying as eligible for any type of small business status, carefully study the requirements. Collect and maintain all necessary documentation that establishes eligibility, including corporate formation documents and financial and employment records.

2. Be particularly careful when making representations about ownership, control, number of employees, revenues, and other verifiable facts. Inaccurate reporting of information could be considered a material misrepresenta-

tion and be disqualifying, or subject the company to liability.

3. Understand the need to periodically update or confirm the company's size status and continued eligibility for special programs. If ownership, control, or other factors change due to an acquisition, merger, or significant investment, status may need to be immediately updated, and appropriate contracting officers will require notice of the changes. The same is true if the person upon whom initial eligibility was based dies or becomes disabled or otherwise unable to run day-to-day operations.

4. Just as your circumstances can change, the rules and regulations governing small business programs can change as well. Be sure to keep up to date of changes and updates to eligibility, certification requirements, and program operations. Industry publications, the SBA, and legal counsel are good sources of information about these changes.

5. The SBA offers free business counseling and other resources to small businesses, as do many state and local government agencies and private industry groups. Take advantage of these opportunities.

6. Large prime contractors are constantly looking for reputable small businesses to partner with to meet their small business program goals. Become familiar with contractors in your industry, and add your company name to their lists of eligible small businesses so that you are notified of procurement opportunities.

7. Consider participation in a mentor-protégé program, which will allow you to benefit from the mentorship and resources of larger, established firms, while at the same time enabling them to participate in business opportunities that are otherwise only available to small businesses.

8. The SBA has financial programs to help small businesses, including various categories of SBA loans, such as SBA 7(a) Standard Loans, Express Loans, 504 Loans, Microloans, and Community Advantage Loans. Consider whether any of these programs might help your company achieve your financial goals.

ENDNOTES:

¹See Press Release, U.S. Small Business Admin.,

Federal Government Exceeds Small Business Contracting Goals by Awarding Record-Breaking \$132.9 Billion to Small Businesses (Aug. 21, 2020), <https://www.sba.gov/node/1671825>.

²Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232 (July 30, 1953); amended by Small Business Act of 1958, Pub. L. No. 85-536, 72 Stat. 384 (July 18, 1958); codified at 15 U.S.C.A. § 631.

³15 U.S.C.A. § 631(a).

⁴15 U.S.C.A. § 631(a).

⁵13 C.F.R. § 121.105.

⁶See 13 C.F.R. § 121.101.

⁷See 13 C.F.R. § 121.104.

⁸See 13 C.F.R. § 121.106.

⁹See 13 C.F.R. § 121.201.

¹⁰See 13 C.F.R. § 121.201.

¹¹See 13 C.F.R. § 121.201.

¹²See 13 C.F.R. § 121.702.

¹³See 13 C.F.R. § 121.104; 84 Fed. Reg. 66561 (Dec. 5, 2019) (amending 13 C.F.R. pt. 121); see also Small Business Runway Extension Act, Pub. L. No. 115-324, 132 Stat. 4444 (Dec. 17, 2018) (codified at 15 U.S.C.A. § 632(a)(2)(C)(ii)(II)).

¹⁴84 Fed. Reg. 66561 (Dec. 5, 2019) (amending 13 C.F.R. pt. 121).

¹⁵13 C.F.R. § 121.104.

¹⁶13 C.F.R. § 121.106(b).

¹⁷13 C.F.R. § 121.201 (emphasis added).

¹⁸See Specht & Chudd, “Small Business Issues in Government Contracts Mergers & Acquisitions,” 14-9 Briefing Papers 1, at 9–10 (Aug. 2014); Hewitt, Williams & Alba, “Small Business Contracting Programs—Part I,” 10-11 Briefing Papers 1, at 10–11 (Oct. 2010).

¹⁹FAR 19.502-2(a).

²⁰FAR 19.502-3(a).

²¹FAR 19.203(c); see also FAR 19.502-2(b).

²²See FAR 19.301-1.

²³FAR 19.301-1(a).

²⁴FAR 19.301-1(b).

²⁵FAR 19.301-1(f).

²⁶FAR 19.301-1(f).

²⁷FAR 19.301(g).

²⁸See FAR 19.203(c).

²⁹15 U.S.C.A. § 644(g)(1).

³⁰U.S. Small Business Admin., Office of Policy, Planning and Liaison, Small business procurement scorecard overview (2020), <https://www.sba.gov/document/support-small-business-procurement-scorecard-overview>.

³¹See Press Release, U.S. Small Business Admin., Federal Government Exceeds Small Business Contracting Goals by Awarding Record-Breaking \$132.9 Billion to Small Businesses (Aug. 12, 2020), <https://www.sba.gov/article/2020/aug/12/federal-government-exceeds-small-business-contracting-goals-awarding-record-breaking-1329-billion>.

³²See FAR 19.800.

³³FAR 19.800(b).

³⁴15 U.S.C.A. § 631(f)(2)(A)–(C); see also 13 C.F.R. § 124.1.

³⁵See Cong. Research Serv., R44844, SBA’s “8(a) Program”: Overview, History, and Current Issues 1 (updated Aug. 24, 2020), <https://fas.org/sgp/crs/misc/R44844.pdf>.

³⁶See 13 C.F.R. § 124.102 (citing the size standards outlined in 13 C.F.R. pt. 121).

³⁷See 13 C.F.R. §§ 124.101, 124.105.

³⁸See 13 C.F.R. §§ 124.101, 124.107.

³⁹13 C.F.R. § 124.3.

⁴⁰13 C.F.R. § 124.105(a).

⁴¹13 C.F.R. § 124.106(a)(2).

⁴²13 C.F.R. § 124.106.

⁴³See 13 C.F.R. §§ 124.105, 124.515(a); see also 13 C.F.R. § 124.515(b) (waiver requirements).

⁴⁴13 C.F.R. 124.105(i).

⁴⁵13 C.F.R. 124.105(i)(1).

⁴⁶13 C.F.R. § 124.103(a).

⁴⁷13 C.F.R. § 124.103(b).

⁴⁸13 C.F.R. § 124.103(c).

⁴⁹13 C.F.R. § 124.104(a).

⁵⁰13 C.F.R. § 124.104(c)(2).

⁵¹13 C.F.R. § 124.104(c)(3).

⁵²13 C.F.R. § 124.104(c)(4).

⁵³13 C.F.R. § 124.104(b)(2).

⁵⁴13 C.F.R. § 124.108.

⁵⁵13 C.F.R. § 124.107.

⁵⁶13 C.F.R. § 124.107(b)(1)(i)–(v).

⁵⁷13 C.F.R. § 124.107(d).

⁵⁸13 C.F.R. § 124.107(e).

⁵⁹13 C.F.R. § 124.202 (directing applicants to <http://www.sba.gov>).

⁶⁰13 C.F.R. § 124.203; see 85 Fed. Reg. 66146, 66159 (Oct. 16, 2020) (amending 13 C.F.R. pts. 121, 124, 125, 126, 127 & 134 effective Nov. 16, 2020).

⁶¹13 C.F.R. § 124.204(a).

⁶²13 C.F.R. § 124.204(a).

- ⁶³13 C.F.R. § 124.112(a).
- ⁶⁴13 C.F.R. § 124.2.
- ⁶⁵13 C.F.R. § 124.102.
- ⁶⁶FAR 19.805-1.
- ⁶⁷FAR 19.805-1.
- ⁶⁸13 C.F.R. § 125.12.
- ⁶⁹Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, § 101, 113 Stat. 233 (Aug. 17, 1999) (codified at 15 U.S.C.A. § 657b note).
- ⁷⁰Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. No. 106-50, 113 Stat. 233 (Aug. 17, 1999) (codified at 15 U.S.C.A. § 657b).
- ⁷¹Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651 (Dec. 16, 2003) (codified at 15 U.S.C.A. § 657f).
- ⁷²15 U.S.C.A. § 657f (b); see also 13 C.F.R. § 125.22.
- ⁷³13 C.F.R. § 125.23.
- ⁷⁴15 U.S.C.A. § 657f (a); see also 13 C.F.R. § 125.23.
- ⁷⁵Exec. Order No. 13360, 69 Fed. Reg. 62549 (Oct. 26, 2004).
- ⁷⁶Exec. Order No. 13360, 69 Fed. Reg. 62549 (Oct. 26, 2004).
- ⁷⁷Exec. Order No. 13360, 69 Fed. Reg. 62549, 62550 (Oct. 26, 2004).
- ⁷⁸See GSA Interact, Veterans Technology Services 2 (VETS2) GWAC Customer and Industry Partner Community, <https://interact.gsa.gov/group/vets2/information> (last visited Sept. 26, 2020).
- ⁷⁹See U.S. General Services Admin., VETS 2 Governmentwide Acquisition Contract (GWAC), <https://www.gsa.gov/technology/technology-purchasing-programs/governmentwide-acquisition-contracts/vets-2-governmentwide-acquisition-contract-gwac> (last visited Sept. 23, 2020).
- ⁸⁰U.S. Small Business Admin., SDVOSB Program Administration, <https://www.sba.gov/partners/contracting-officials/contracting-program-administration/sdvosb-program-administration> (last visited Sept. 23, 2020).
- ⁸¹FAR 19.1405(a)(3); 13 C.F.R. §§ 125.22 to 125.23.
- ⁸²Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, §§ 502–503, 120 Stat. 3403, 3431 (Dec. 22, 2006) (codified at 38 U.S.C.A. §§ 8127–8128)).
- ⁸³Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, §§ 502–503, 120 Stat. 3403, 3431 (Dec. 22, 2006) (codified at 38 U.S.C.A. §§ 8127–8128); see also 48 C.F.R. §§ 819.7001 to 819.7009.
- ⁸⁴38 U.S.C.A. § 8127(d); 48 C.F.R. §§ 819.7005 to 819.7006.
- ⁸⁵48 C.F.R. §§ 819.7005 to 819.7006.
- ⁸⁶48 C.F.R. §§ 819.7004, 819.7005(a).
- ⁸⁷Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969 (2016).
- ⁸⁸U.S. Department of Veterans Affairs, Office of Small & Disadvantaged Business Utilization, <https://www.va.gov/osdbu/library/accomplishments.asp>. (last visited on Sept. 23, 2020)
- ⁸⁹National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1832, 130 Stat. 2000, 2658 (2016) (amending the Small Business Act’s definition of a “small business concern owned and controlled by service-disabled veterans”); see also 15 U.S.C.A. § 632(q)(2).
- ⁹⁰83 Fed. Reg. 48221 (Sept. 24, 2018) (amending 38 C.F.R. pt. 74).
- ⁹¹See 38 C.F.R. §§ 74.1 to 74.5.
- ⁹²See 15 U.S.C.A. § 632(q); 13 C.F.R. § 125.11; 38 C.F.R. §§ 74.1, 74.3.
- ⁹³See 15 U.S.C.A. § 632(q)(3); 38 U.S.C.A. § 101(16).
- ⁹⁴See 13 C.F.R. § 125.11; 38 C.F.R. § 74.1.
- ⁹⁵38 C.F.R. § 3.1; 38 U.S.C.A. §§ 101(2), (16).
- ⁹⁶See 38 U.S.C.A. § 101(2), (16).
- ⁹⁷13 C.F.R. § 125.12.
- ⁹⁸13 C.F.R. § 125.12.
- ⁹⁹13 C.F.R. § 125.12.
- ¹⁰⁰13 C.F.R. § 125.13.
- ¹⁰¹13 C.F.R. § 125.13.
- ¹⁰²13 C.F.R. § 125.13.
- ¹⁰³13 C.F.R. § 125.13(m); see 83 Fed. Reg. 48908 (Sept. 28, 2018) (amending 13 C.F.R. pt. 125).
- ¹⁰⁴13 C.F.R. § 125.11.
- ¹⁰⁵See FAR 19.1403(b) (“At the time that a service-disabled veteran-owned small business concern submits its offer, it must represent to the contracting officer that it is a [SDVOSB].”)
- ¹⁰⁶See 38 C.F.R. § 74.1; see also 38 C.F.R. §§ 74.2(a), 74.10.
- ¹⁰⁷38 C.F.R. § 74.11(a)–(b).
- ¹⁰⁸38 C.F.R. § 74.15.
- ¹⁰⁹38 C.F.R. § 74.15.
- ¹¹⁰38 C.F.R. §§ 74.15, 74.20.
- ¹¹¹Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7106, 108 Stat. 3243, 3369 (1994) (codified as amended at 15 U.S.C.A. § 644(g)(1)).
- ¹¹²Consolidated Appropriations Act for Fiscal Year 2001, Pub. L. No. 106-554, appx. I, § 811, 114 Stat. 2763, 2763A-708 (2000) (codified at 15 U.S.C.A. § 637(m)).

¹¹³15 U.S.C.A. § 637(m)(2).

¹¹⁴Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62258 (Oct. 7, 2010) (amending 13 C.F.R. pts. 121, 124, 125, 127 & 134).

¹¹⁵13 C.F.R. § 127.101; FAR 19.1506.

¹¹⁶13 C.F.R. §§ 127.500 to 127.503.

¹¹⁷FAR 19.1506.

¹¹⁸13 C.F.R. §§ 127.200, 127.201.

¹¹⁹13 C.F.R. § 127.202.

¹²⁰13 C.F.R. §§ 124.104, 127.102, 127.200 to 127.203.

¹²¹13 C.F.R. §§ 124.104, 127.203.

¹²²See 13 C.F.R. § 127.300(b)(2).

¹²³National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 825, 128 Stat. 3292, 3437 (Dec. 19, 2014) (amending 15 U.S.C.A. § 637(m)).

¹²⁴See, e.g., NASA Office of Inspector General, Review of NASA's Internal Controls for Awards With Small Businesses Audit Report (Feb. 28, 2013), <https://oig.nasa.gov/audits/reports/FY13/IG-13-010.pdf>; see also U.S. Small Business Admin. Office of Inspector General, No. 18-18, SBA's Women-Owned Small Business Federal Contracting Program Report (June 20, 2018); see also U.S. Gov't Accountability Office, GAO-19-168, Women-Owned Small Business Program: Actions Needed To Address Ongoing Oversight Issues (Mar. 14, 2019).

¹²⁵Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification, 85 Fed. Reg. 27650 (May 11, 2020) (amending 13 C.F.R. pts. 124, 125, 126 & 127); 13 C.F.R. §§ 127.300 to 127.356.

¹²⁶13 C.F.R. § 127.303.

¹²⁷U.S. Small Business Admin., FY2012 Congressional Budget Justification and FY2010 Annual Performance Report 9 (2012) <https://www.sba.gov/sites/default/files/FINAL%20FY%202012%20CBI%20FY%202010%20APR.pdf>; see also 15 U.S.C.A. §§ 632(p), 657a(b) (defining “historically underutilized business zone” as “any area located within 1 or more—(A) qualified census tracts; (B) qualified nonmetropolitan counties; (C) lands within the external boundaries of an Indian reservation; (D) redesignated areas; or (E) base closure areas; (F) qualified disaster areas; or (G) a Governor-designated covered area.”).

¹²⁸U.S. Small Business Admin., FY2012 Congressional Budget Justification and FY2010 Annual Performance Report 29 (2010), <https://www.sba.gov/sites/default/files/FINAL%20FY%202012%20CBI%20FY%202010%20APR.pdf>.

¹²⁹FAR 19.1301.

¹³⁰13 C.F.R. § 126.103 (definition of “HUBZone”).

¹³¹See U.S. Small Business Admin., HUBZone Map,

<https://maps.certify.sba.gov/hubzone/map#center=39.828200,-98.579500&zoom=5> (last visited Sept. 28, 2020).

¹³²See 13 C.F.R. § 126.103 (definitions of “qualified census tract,” “qualified disaster area,” and “qualified non-metropolitan county”).

¹³³13 C.F.R. § 126.600(a)–(b).

¹³⁴13 C.F.R. § 126.600(c).

¹³⁵See Cong. Research Serv., R41268, Small Business Administration HUBZone Program 2 (updated Aug. 24, 2020), <https://fas.org/sgp/crs/misc/R41268.pdf>.

¹³⁶13 C.F.R. § 126.200(b).

¹³⁷13 C.F.R. § 126.200(a)(1)–(6).

¹³⁸13 C.F.R. § 126.200(c).

¹³⁹13 C.F.R. § 126.200(d).

¹⁴⁰13 C.F.R. § 126.200(e).

¹⁴¹13 C.F.R. § 126.200(f).

¹⁴²13 C.F.R. §§ 126.300(a), 126.303.

¹⁴³The List of Qualified HUBZone Small Business Concerns is available at http://dsbs.sba.gov/dsbs/search/dsp_searchhubzone.cfm.

¹⁴⁴See FAR 19.1303.

¹⁴⁵84 Fed. Reg. 65222 (Nov. 26, 2019) (amending 13 C.F.R. pts. 115, 121, 125, 126 & 127).

¹⁴⁶84 Fed. Reg. at 65228.

¹⁴⁷13 C.F.R. § 126.200(c)(1).

¹⁴⁸13 C.F.R. § 126.200(c)(1).

¹⁴⁹13 C.F.R. § 126.200(d)(3).

¹⁵⁰13 C.F.R. § 126.103.

¹⁵¹13 C.F.R. § 126.602(d).

¹⁵²See 41 U.S.C.A. § 3303(b)

¹⁵³ See generally FAR subpt. 19.7.

¹⁵⁴Cong. Research Serv., R44844, SBA's “8(a) Program”: Overview, History, and Current Issues 2 (updated Aug. 24, 2020), <https://fas.org/sgp/crs/misc/R44844.pdf>.

¹⁵⁵See generally 13 C.F.R. pt. 120.

¹⁵⁶See U.S. Small Business Admin., The All Small Mentor-Protégé Program: The Mentor-Protégé Agreement, <https://www.sba.gov/sites/default/files/articles/AllSmallMentorProtegeProgramMentorProtegeAgreementFinal508.pdf>. (last visited Sept. 23, 2020).

¹⁵⁷See 13 C.F.R. § 125.9(a). See generally Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments, 85 Fed. Reg. 66146 (Oct. 16, 2020) (amending 13 C.F.R. pts. 121, 124, 125, 126, 127 & 134 effective Nov. 16, 2020).

¹⁵⁸See 13 C.F.R. § 125.9(d)

¹⁵⁹13 C.F.R. § 125.9(d)

¹⁶⁰13 C.F.R. § 125.9(a) (describing assistance available to protégés).

¹⁶¹13 C.F.R. § 125.9(d).

¹⁶²13 C.F.R. § 125.9(e); see also U.S. Small Business Admin., All Small Mentor-Protégé Program, <https://www.sba.gov/federal-contracting/contracting-assistance-programs/all-small-mentor-protége-program> (last visited Sept. 23, 2020).

¹⁶³13 C.F.R. § 125.9(c).

¹⁶⁴13 C.F.R. § 125.9(b).

¹⁶⁵13 C.F.R. § 125.9(e); see 85 Fed. Reg. 66146 (Oct. 16, 2020) (amending 13 C.F.R. pts. 121, 124, 125, 126, 127 & 134 effective Nov. 16, 2020).

¹⁶⁶13 C.F.R. § 125.9(e).

¹⁶⁷13 C.F.R. § 125.8(c).

¹⁶⁸38 U.S.C.A. § 8127(d).

¹⁶⁹See FAR 19.1307.

¹⁷⁰See FAR 19.302; 13 C.F.R. § 121.1001.

¹⁷¹See FAR 19.302.

¹⁷²See DynaLantic Corp., Comp. Gen. Dec. B-402326, 2010 CPD ¶ 103, at 5 (where the GAO stated that “the SBA, not our Office, has conclusive authority to determine the size status of an offeror for federal procurement purposes”).

¹⁷³See 13 C.F.R. § 121.1004; FAR 19.302.

¹⁷⁴13 C.F.R. § 124.515(a).

¹⁷⁵See generally 13 C.F.R. § 121.404(g).

¹⁷⁶FAR 52.219-28; see also 13 C.F.R. § 121.404(g).

¹⁷⁷See Specht & Chudd, “Small Business Issues in Government Contracts Mergers & Acquisitions,” 14-9 Briefing Papers 1 (2014).

¹⁷⁸Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1341, 124 Stat. 2504, 2543 (2010) (adding 15 U.S.C.A. § 632(w)).

¹⁷⁹15 U.S.C.A. § 645(d).

¹⁸⁰13 C.F.R. § 121.108.

¹⁸¹See, e.g., the Woman-Owned Small Business Program under 13 C.F.R. § 127.700.

¹⁸²31 U.S.C.A. §§ 3729–3733.

¹⁸³31 U.S.C.A. §§ 3729(a)(1).

¹⁸⁴18 U.S.C.A. § 287.

¹⁸⁵See Press Release, U.S. Dep’t of Justice, Construction Company Officer Pleads Guilty To Conspiring To Defraud Government (Nov. 15, 2016), <https://www.justice.gov/opa/pr/construction-company-officer-pleads-guilt-y-conspiring-defraud-government>.

¹⁸⁶See United States v. UFC Aerospace LLC, No. 1:12-cv-02594, 2015 WL 9921169 (S.D.N.Y. Oct. 8, 2015).

¹⁸⁷See Press Release, U.S. Dep’t of Justice, Florida Company and Owner Agree To Resolve Alleged False Claims Act Violations Regarding Historically Underutilized Business Zone Program (Apr. 8, 2015), <https://www.justice.gov/opa/pr/florida-company-and-owner-agree-resolve-alleged-false-claims-act-violations-regarding>.

¹⁸⁸See Press Release, U.S. Dep’t of Justice, Florida Company and Owner Agree To Resolve Alleged False Claims Act Violations Regarding Historically Underutilized Business Zone Program (Apr. 8, 2015), <https://www.justice.gov/opa/pr/florida-company-and-owner-agree-resolve-alleged-false-claims-act-violations-regarding>.

¹⁸⁹See Press Release, U.S. Dep’t of Justice, Central New York Construction Companies and Others To Pay Nearly \$4.5 Million To Resolve Allegations of Fraud Involving Contracting Opportunities Meant for Disabled Veterans (May 4, 2020), <https://www.justice.gov/usao-ndny/pr/central-new-york-construction-companies-and-others-pay-nearly-45-million-resolve>.

¹⁹⁰CVE Protest of Covenant Constr. Servs. Re: Concord Construction LLC, SBA No. CVE-152-P, 2020 WL 3351185 (June 8, 2020).

¹⁹¹In the Matter of Sonoran Constr. Grp., SBA No. BDPT-581, 2020 WL 3482477 (June 18, 2020).

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BRIEFING PAPERS