



U.S. Small Business  
Administration

# Legislative & Regulatory Update

## For Small Business Government Contracting Programs

Department of the Navy Gold Coast

July 28, 2023

# Legislative Action

# James M. Inhofe NDAA for FY23

[Pub. Law 117-263](#), enacted 12/23/22

- Codifies SBA scorecard and add set-aside data
- Requires Congressional reports on consolidated contracts
  - Agencies must provide information to SBA
- Makes permanent DoD Mentor-Protégé Program
  - Pilot for protégés to receive reimbursement for technology development
- Creates statutory DHS mentor-protégé program
- Authorizes DoD contract modifications to address economic inflation (sect. 822)

# SBIR and STTR Extension Act of 2022

[Pub. Law 117-183](#), signed by the President on 9/30/22

- Extends the SBIR and STTR programs into FY 2025
- Businesses must disclose foreign ties
- Requires each agency to establish a Due Diligence Program on foreign influence
- Requires the Secretary of Defense to establish an Innovation Open Topics Program
- Increases Minimum Performance Standards

## Introduced in the House

- [H.R. 986](#) - require the DoD and SBA to coordinate government contracting assistance offered by SBDCs and APEX Accelerators
- [H.R. 1583](#) (Carson) - Provide for contracting preferences and other benefits for emerging business enterprises
- [H.R. 1744](#) (Castro) – Require SBA to disaggregate data on Federal contracts awarded to SDBs
- [H.R. 2726](#) (Stauber) - Provide 50% interim partial payment to small business for construction-related requests for equitable adjustments
- [H.R. 2744](#) (Bean) – Freedom from Government Competition Act

## Introduced in the House (cont.)

- [H.R. 3511](#) (LaLota) – Require training for agencies that miss SDVOSB prime goal
- [H.R. 3716](#) (Neguse) – Increase the governmentwide small business goal to 25%
- [H.R. 3830](#) (Tokuda) – Expand sole-source authority for NHO-owned 8(a) participants

## Introduced in the Senate

- [S. 1407](#) (Sullivan)- eliminate the requirement for award of 8(a) construction contracts within the area of performance
- [S. 1469](#) (Ernst) - require certification of a SDVOSB in order to be counted toward goals for contract awards
- [S. 1470](#) (Ernst) – require certification of a women-owned SB in order to be counted toward goals for contract awards
- [S. 2144](#) (Hirono) – expand sole-source authority for NHO-owned 8(a) participants
- [S. 2146](#) (Ossoff) – increase the governmentwide SDVOSB goal

# Executive Action



# OMB Memo on Increasing SDB Dollars

**M-23-01**, Increasing the Share of Contracting Dollars Awarded to Small Disadvantaged Businesses (Oct. 4, 2022)

- Raises the governmentwide goal for Small Disadvantaged Business spending to 12% for FY23
  - SBA negotiates goals with 24 CFO Act agencies
- Build diversity and resilience of the Federal supplier base
- Lower barriers to entry and create opportunities for SDBs, WOSBs, SDVOSBs, and HUBZone businesses

# OMB Memo on New and Recent Entrants

[M-23-11](#), Creating a More Diverse and Resilient Federal Marketplace through Increased Participation of New and Recent Entrants (Feb. 17, 2023).

- Focus on new and recent contractors to provide fresh innovative thinking
- Common definitions of "new entrant" and "recent entrant"
- [Supplier Base Dashboard](#) to track an agency's mix of new entrants, recent entrants, and established vendors
- "Priority supply chains"--market segments where agencies have experienced challenges finding contractors
- [Government-Wide Procurement Equity Tool](#) to support outreach for greater geographic and demographic diversity in procurement competitions.

# Recent SBA Regulatory Action

## **SBA Final Rule: Ownership/Control and Contract Assistance for 8(a)** **88 FR 26164** (April 27, 2023 corrected May 5, 2023)

- Size and socioeconomic status determinations from SBA
  - Business shall update its status in SAM.gov no later than 2 days after final determination
  - SBA shall update if the business does not do so
  - Business must notify agencies with which it has a pending offer
- NMR waiver requests only required to reach 50% by SB manufacturers + waived items
- Prohibits competitions that require multiple certifications
- 8(a)/WOSB/HZ/SDVOSB cannot be JV partner for more than 1 JV per contract

## **SBA Final Rule: Ownership/Control and Contract Assistance for 8(a)** **88 FR 26164** (April 27, 2023 corrected May 5, 2023)

- 8(a) on unrestricted multiple-award contracts or FSS
  - Must be offered and accepted by SBA, SBA will verify firm
  - Can use FSS ordering procedures
- SDB reviews and protests
- Include BPAs in list of vehicles subject to consolidation and bundling
- Overhead costs in Individual subcontracting calculations for prime contracts exceeding \$7.5 million
- LOS – CO cannot give satisfactory/positive past performance to a business that fails to comply with LOS, unless determination approved

## **SBA Final Rule: Ownership/Control and Contract Assistance for 8(a)** **88 FR 26164** (April 27, 2023 corrected May 5, 2023)

- For Business Activity Targets – SBA will consider extenuating circumstances, offers on non-8(a) procurements
- Only need to document IRA exception for economic disadvantage if requested by SBA
- Threshold application issues: for-profit, citizen, one-time eligibility, some revenues for individually-owned applicants
- Bona fide place of business (moratorium through FY23) – can use existing contract locations
- Offer and acceptance not required under SAT, but still need eligibility
- Only active 8(a) firms can receive sole-source orders

## **SBA Interim Final Rule: Inflation Adjustment for Size Standards, ED thresholds** **87 FR 69118 (Nov. 17, 2022)**

- Adds 13% increase to revenue-based size standards
- Adjusts economic disadvantage thresholds and other thresholds
  - Net worth from \$750,000 to \$850,000
  - AGI from \$350,000 to \$400,000
  - Total assets from \$6 mil to \$6.5 mil
  - Dollar limit for combined 8(a) contracts from \$100 mil to \$168,500,000

## **SBA Final Rule: Adoption of 2022 NAICS for Size Standards**

**[87 FR 59240](#)** (Sept. 29, 2022)

- Reorganized SBA's size standard table for OMB's new NAICS revision.
- New NAICS codes were effective in January.
- The NAICS 2022 revision creates 111 new industries.
- Effective October 1, 2022.
- SBA also updated the WOSB Program NAICS codes in [87 FR 69060](#).



# SBA Final Rule: Manufacturing and Employee-Based Size Standards

**88 FR 9970** (Feb. 15, 2023; eff. March 17)

- Increases 144 employee-based size standards
- Retains 500-employee NMR size standard
- Notable increases
  - 325412, Pharmaceutical Preparation Manufacturing, from 1,250 to 1,300 employees
  - 331491, Nonferrous Metal (except Copper and Aluminum) Rolling, Drawing, and Extruding, from 750 to 900 employees
  - 336611, Ship Building and Repairing, from 1,250 to 1,300 employees
  - 339999, All Other Miscellaneous Manufacturing, from 500 to 550 employees
  - 562910 (Exception), Environmental Remediation Services, from 750 to 1,000 employees

## **Final Rule: Veteran-Owned, Service-Disabled Veteran-Owned Certification** **87 FR 73400** (Nov. 29, 2022), **corrected** on July 2, 2023

- Governmentwide certification program for SDVOSBs
- Effective Jan. 1, 2023, self-certified SDVOSBs have one year to apply to SBA for certification
  - Existing VA-certified VOSB and SDVOSB stay certified
  - VA certifications are extended by 1 year
- Certification is required for set-aside or sole source SDVO or VOSB contracts
  - To get certified, must be small for a NAICS code on SAM profile
  - Unconditionally owned by veteran—but reasonable right of first refusal OK
  - Control—no outside obligations that prevent veteran from devoting time/attention
- No changes on self-certification for subcontracting or prime credit—potential separate rulemaking upcoming

## **SBA Final Rule:** Past Performance Ratings for JV members and Subcontractors

**87 FR 43731** (July 22, 2022)

- Small business can use past performance from a joint venture, provided it worked on the joint venture's contracts
- Small business can use past performance from a first-tier subcontract to go after a prime contract
  - Subcontracting plans will direct primes to provide a rating to the small business within 15 days
  - The small business must make the request to the prime contractors no later than 30 days after the end of the period of performance of the contract with the government.

# SBA Final Rule: HUBZone Appeal Process

[88 FR 21086](#) (April 10, 2023)

- Authorizes SBA OHA to hear appeals from HUBZone protest decisions
  - Previously handled within SBA's GCBD
- Creates rules of practice for OHA to hear HUBZone appeals

# SBA Proposed Rule: Credit for Lower Tier Subcontracting

[87 FR 77529](#) (Dec. 19, 2022)

- Permits prime contractor to apply credit for subcontracts to small businesses at lower tiers toward its subcontracting goals
  - Only for individual plans, not commercial/comprehensive/GWAC/multi-agency contracts
  - Election recorded in the subcontracting plan
- Prime would incorporate lower-tier performance into subcontracting goals

# Upcoming SBA proposed rules

1. HUBZone Program Updates and Clarifications
2. Affiliation in Small Business Procurement Programs; Women-Owned Small Business Program
3. Small Business Contracting: Increasing Small Business Participation on Multiple Award Contract

# Recent FAR Regulatory Action

# FAR Final Rule: Small Business Amendments

[88 FR 9734](#) (Feb. 14, 2023)

- Limit options past the 5th year on a long-term 8(a) contract to 8(a) firms that continue to qualify as 8(a) participants
- Clarify that the size standard for IT value-added resellers is 150 employees
- Apply the ostensible subcontractor rule to SBA's socioeconomic programs
- Determine size as of initial offer if the solicitation does not require a price evaluation



# FAR Final Rule: Accelerated Payments

[88 FR 9730](#) (Feb. 14, 2023)

- Expands accelerated payments to small businesses
- 15-day goal of paying small-business prime contractors after invoice
- Accelerates payments to other prime contractors that agree to pay their small-business subcontractors within 15 days of the payment without further consideration from the small business

# FAR Final Rule: WOSB Certification

[87 FR 58237](#) (Sept. 23, 2022)

- Require EDWOSB and WOSB concerns to apply for certification through SBA or an SBA-approved third-party certifier and to be certified in order to be eligible for WOSB or EDWOSB set-aside or sole-source contracts under the Program.
- Requires agencies to check SAM or SBA's DSBS for WOSB/EDWOSB set-asides and sole-source awards
  - SAM designation not yet effective
- Firms may submit offers on WOSB/EDWOSB set-asides if certification is pending

# FAR Final Rule: Policy on Joint Ventures

[87 FR 58219](#) (Sept. 23, 2022)

- Permits joint ventures between mentor and protégé to qualify as small or for a socioeconomic program
- Agencies must consider the past performance of each party to a joint venture if the joint venture is not able to demonstrate its own
- SBA does not perform joint venture approval for competitive 8(a) awards (but still determines 8(a) participant eligibility)

# FAR Final Rule: Update of HUBZone Program

[87 FR 58232](#) (Sept. 23, 2022)

- HUBZone firms are certified annually for the entire year, instead of being required to represent for each offer
- Removes requirement for firm to be HUBZone qualified at both offer and award for HUBZone set-asides—instead just offer
- Authorizes HUBZone set-aside and sole source awards under SAT
- HUBZone offerors must attempt to maintain HUBZone residency percentage if performing a HUBZone contract

# FAR Final Rule: Construction Contract Administration

[87 FR 58227](#) (Sept. 23, 2022)

- For construction contracts for small businesses, agency must publish information about definitization of equitable adjustments
  - Policies or procedures that apply to definitization of equitable adjustments for change orders under construction contracts
  - 3-year data on time required to definitize equitable adjustments
    - Use table showing number of change orders definitized within 30 days, 60 days, 90 days, 180 days, 365 days, or more
    - If have less than 3 years, provide for available FYs
- Agency must collect data on time required to definitize change orders for construction contracts

# FAR Final Rule: Exemption from Inflation Adjustments

[88 FR 25476](#) (April 26, 2023)

- Exempts two thresholds from automatic inflation increases:
  - The dollar level at which payment and performance bonds are required on a construction contract (currently \$150,000); and
  - The dollar level at which payment protections are required as an alternative to payment bonds (currently \$35,000).

# FAR Proposed Rule: SBIR and STTR Programs

[88 FR 20822](#) (April 7, 2023)

- Extension of the SBIR/STTR data rights protection period from a minimum of 4 years to 20 years
- Sole-source actions under Phase III of the SBIR/STTR programs without further justification
- Instances when Phase II sole-source actions may be awarded without justification

# FAR Proposed Rule: 8(a) Program

[87 FR 76598](#) (Dec. 15, 2022)

- Clarifies that the CoC program is not applicable to 8(a) sole-source awards;
- Requires agency to notify SBA when
  1. Agency determines that a procurement, though previously procured under 8(a), is a new requirement not subject to SBA release requirements;
  2. Agency will procure a follow-on 8(a) requirement through a limited-competition contract vehicle



# FAR Proposed Rule: Disclosure of Greenhouse Gas Emissions

[87 FR 68312](#) (Nov. 14, 2022)

- Implements EO for major Federal suppliers to publicly disclose greenhouse gases and climate-related financial risk
- Significant – received between \$7.5 and \$50 mil in contracts in prior year
  - Complete GHG inventory (Scope 1 and 2) and report in SAM.gov
  - ANCs, Indian tribes, NHOs exempted
- Major contractors – received more than \$50 mil in contracts in prior year
  - Requirements of significant contractors **plus**
    - Annual climate disclosure
    - Develop science-based targets
  - Small businesses exempted (but not from significant requirements)

# Upcoming FAR proposed rules

1. Proposed 2023-009, Credit for Lower-Tier Subcontracting
2. Proposed 2023-001, Subcontracting to Puerto Rican and Covered Territory Small Businesses
3. Proposed 2022-009, Certification of Service-Disabled Veteran-Owned Small Businesses
4. Proposed 2021-020, Limitations on Subcontracting Revisions
5. Proposed 2021-011, Past Performance Ratings for Small Business Joint Venture Members and Small Business First-Tier Subcontractor

## Upcoming FAR proposed rules (cont.)

6. Proposed 2021-009, Protests of Orders Set Aside for Small Business
7. Proposed 2020-016, Representation of Size and Socioeconomic Status

# Upcoming FAR final rules

1. 2023-004, Small Disadvantaged Business Threshold



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