

Overview of Government Contract Set-Aside Programs

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Agenda

1. Small Businesses
2. SBA 8(a) Program
3. Service Disabled Veteran Owned Businesses
4. HUBZone
5. Women-Owned Small Businesses
6. Other Small Business Issues



Small Business Set Asides

- Small Business Act Targets for Prime Contracts
 - 23% government wide goal for small businesses
 - 5% for SDB's – 8(a)
 - 5% WOSB
 - 3% HUBZone
 - 3% SDVOSB

What is a small business?

- A company's size is determined:
 - Generally, by reference to the company's primary NAICS category.
 - Specifically, on a contract-by-contract basis, by the NAICS code associated with the procurement.
- NAICS Codes have 1 of 3 methods measuring size
 - Gross Annual Revenue Averaged over 3 Years
 - Number of Employees
 - Both Avg. Revenue and Number of Employees

What is a Small Business

■ Size Standards

- Common Size Standards

- Manufacturing: 500 Employees
- Services: \$7 million in Avg. Gross Annual Revenue

■ Calculation of Annual Revenue

- “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships).



What is a Small Business

- Calculation of Number of Employees
 - Avg. # of employees over the prior 12 months
 - Includes part-time and temporary employees



Affiliation

- Affiliation is a SBA determination that two or more firms are considered to be a single firm for purposes of determining whether those firms are “small businesses”
 - Revenues and # Employees are Aggregated
- Affiliation can be general or only with respect to a particular procurement

Affiliation Tests

- Common ownership or control
- Common management
- Identity of Interest
 - Economic co-dependence
 - Familial interest

Affiliation Tests

■ Joint Ventures

- Parties to a joint venture are affiliates for the contracts awarded to the joint venture.
- Exception 1: Each venturer is small on its own and the requirement is a bundled requirement.
- Exception 2: Each venturer is small on its own and (1) for receipts based size-standards, the contract value exceeds $\frac{1}{2}$ the size standard or (2) for employee based size standards, the contract value exceeds \$10 million dollars.
- Exception 3: The venturers are parties to an SBA approved Mentor-Protégé Agreement.

Affiliation Tests

- **Ostensible Subcontractor Rule**
 - A contractor and its subcontractor are affiliates if subcontractor performs the primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant.
 - Large business incumbent

The “Rule of Two”

- FAR 19.502-2, Total Small Business Set-Asides, states that purchases
- *“shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery.”*

Limitations on Subcontracting

- Small Business Set Asides
 - General Construction: Prime must perform at least 15 percent of the cost of the contract with its own employees.
 - Special trade contractors: Prime will perform at least 25 percent of the cost of the contract with its own employees.
 - Service Contracts: Prime must perform at least 50 percent of the cost of contract performance incurred for personnel through its own.
 - Supply Contract: Prime must perform work for at least 50 percent of the cost of manufacturing the supplies (not including the cost of materials).

SBA 8(a) Business Development

- Formal Certification Process.
- Approximately \$10 Billion contract dollars awarded to the 8(a) program each year.

SBA 8(a) Business Development

- Firm must be directly and unconditionally owned and controlled by an socially and economically disadvantaged individual.
 - Unconditional: executory agreements, voting trusts, options, shareholder agreements.
- Social Disadvantage
 - Rebuttable presumption of social disadvantage for specified groups (African-Americans, Hispanic Americans, Native Americans)
 - If not a member of a designated group, must show at least objective, distinguishing feature that contributed to social disadvantage (race, ethnic origin, gender, physical handicap)

8(a) Eligibility

- Economic Disadvantage
 - Net worth must be less than \$250,000
 - \$750,000 for continued participation
 - Excludes value of business, personal residence, and qualified retirement accounts
 - AGI must be less than \$250,000 averaged over last three tax years.
 - Fair Market Value of all assets must not exceed \$4Million
 - \$6 Million for continued participation.

Eligibility

- Small Business
- Direct Ownership
 - Majority
- Control
 - Board, Highest Executive Office
 - Full Time Employment (no outside employment)
- 2 Years in Business
- Eligible individual must be the highest paid, executive officer



Fiscal Year-End Information

■ Financial Statement

- Requirements change according to income

Gross annual receipts in excess of \$10 mil =
audited financial statements; (first year audited balance
sheet only)

Gross annual receipts between \$2 mil and \$10 mil =
reviewed financial statements;

Gross annual receipts less than \$2 mil = annual financial
statement prepared in-house or a compilation statement
prepared by a CPA.

Excessive Withdrawals

- Cash dividends
- Distributions in excess of amounts necessary to pay S corporation taxes
- Cash withdrawals
- Property withdrawals
- Bonuses
- Loans



When are Withdrawals Excessive?

- More than \$250,000 in any program year for a concern with sales equal to or less than \$1 mil;
- More than \$300,000 in any program year for a concern with sales more than \$1 mil and not more than \$2 mil; and
- More than \$400,000 in any program year for a concern with sales over \$2 mil.

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Service Disabled Veteran Owned Small Businesses

- Self-Certification
- SDVOSB set-asides are optional
- Sole Source Contracts
 - \$100,000 to \$5,500,00 for manufacturing contracts
 - \$3,500,000 for all other contracts

SDVOSB

■ Eligibility

- Owner of the firm must have a service related disability
- At least 51% direct and unconditional ownership
- Control
 - Highest level executive office and sufficient managerial experience
 - Board of Directors
 - Numerical control

Historically Underutilized Business Zone

■ HUBZone

- Designed to encourage business development in economically distressed communities
- Formal Certification Process
- For acquisitions over \$100,000, KOs are required to set aside for HUBZones, where the Rule of Two is satisfied.

■ Eligibility

- Firm must be 51% directly and unconditionally owned and controlled by U.S. Citizens
- The principal office of the firm must be located in a HUBZone
- At least 35% of the firm's employees must reside in a HUBZone

HUBZone

- Sole Source Contracts
 - \$100,000 to \$5,500,00 for manufacturing contracts
 - \$3,500,000 for all other contracts
- 10% price evaluation factor for Full and Open Competition.

Women-Owned Small Businesses

- Two types
 - Economically Disadvantaged Women-Owned Small Business (EDWOSB)
 - Women-Owned Small Business (WOSB)
- WOSB Eligibility
 - 51% direct and unconditional ownership
 - Highest executive position and managerial experience
 - Full-time employment

WOSB

- WOSB Eligibility

- Board of Directors

- EDWOSB Eligibility

- Personal net worth must be less than \$750,000, excluding the value of her equity interest in the firm, the equity value of her personal residence, and the value of IRAs or other qualified retirement accounts.
- Avg. AGI for three preceding years must not exceed \$350,000
- Fair Market Value of all assets must not exceed \$6 Million

WOSB

■ Certification

- Currently, self-certification with compliance with compliance with WOSB Program Repository or third-party certification.
- 2015 NDAA eliminated self-certification and it is unclear whether a formal, SBA controlled certification process will replace the current system or whether all parties will have to follow the third-party certification process.

■ Sole-Source Contracts

- Proposed Rule May, 2015

Small Biz Issues- Legal Protections

Prompt Payment Act

- Requires agencies to make payment within 30 days of receipt of a proper invoice.
- In construction contracts, requires a Prime to pay its sub within 7 days of payment by the customer and interest on late payments.
- Contractors must be notified of late or reduced payments to subcontractors
 - Compliance may be considered in Past Performance Evaluations

Legal Protections (Cont'd)

■ Subcontracting Plan

- Applies to contracts for supply and service contracts expected to exceed \$650,000 and construction contracts expected to exceed \$1.5M.
- Prospective contractor must submit a detailed plan describing the efforts of the contractor will take to subcontract with preferred concerns.
- Statement of total \$\$ planned to be subcontracted to small businesses.
- Plan becomes a part of the contract.
- Liquidated damages if Primes fails to comply in dollar value equal to the missed target.

Legal Protections – New 13. C.F.R. 125.3(c)

- An offeror must represent to CO that it will make a good faith effort to acquire work from the small business concerns that it used in preparing the bid or proposal, in the same scope, amount, and quality used in preparing and submitting the bid or proposal.
- If a prime contractor fails to meet the requirement, the prime contractor must provide the contracting officer with a written explanation. This written explanation must be submitted to the contracting officer prior to the submission of the invoice for final payment and contract close-out.

Questions?

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