

Government Contracts Legal Update 2024

ICBS Show – Diversity in Government Contracting

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Presentation Road Map

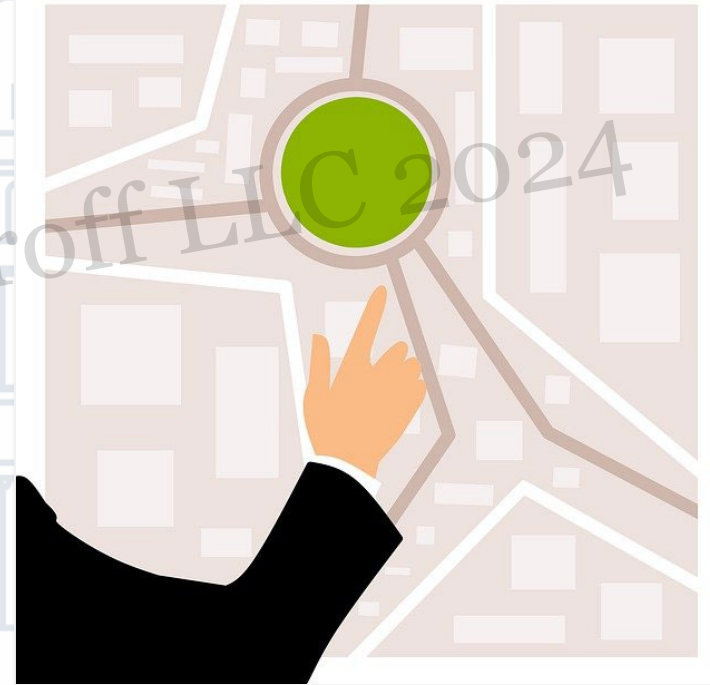
BEFORE WE GET STARTED . . .

- This presentation is for educational use only and is not individualized legal advice
- This presentation covers the rules in effect when the presentation was given—but check for updates in the future!

Presentation Road Map

ROAD MAP

- Socioeconomic Program Updates
 - 8(a) Program
 - HUBZone & SDVOSB Program
- Joint Ventures & Teaming
- SBA Size & Affiliation Updates
- Miscellaneous Updates
- Questions?





8(a) Program Updates

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8(a) Social Disadvantage

ULTIMA SERVICES CORP. V. USDA

- All individually owned entities need social disadvantage narrative
 - Tribes/ANCs/NHOs still exempt (for now)
 - SBA previously prioritized 8(a)s pending-award
 - SBA Reopened *Certify* application portal after a delay (portal was down recently for updates)
- Be proactive and talk to your BOS
- Keep up-to-date on SBA Guidance

8(a) Social Disadvantage

SBA GUIDANCE

- Follow SBA's Format
 - 2 examples of social disadvantage (not more)
 - 6 questions for each instance: who, what, where, why, when, and how

Would satisfy

Example 1 (Education): My faculty advisor, (whose name I do not recall); and Dr. John Doe, the Director the University of ABC School of Health Sciences

Would not satisfy

Example 1 (Education): My professors

- Our Experience: SBA approving more SDNs
 - <https://sbaone.atlassian.net/wiki/spaces/CKB/pages/2768076819/Guide+for+Demonstrating+Social+Disadvantage>

8(a) Rule Changes

SBA FINAL RULE

- No restricted 8(a) competition/evaluation preference for having multiple statuses
 - Similar provisions for HUBZone, WOSB, and SDVOSB regulations
- Can award 8(a) sole-source orders or compete 8(a) orders under non-8(a) MAC
 - Orders offered/accepted and specify POW and/or NMR “apply as appropriate”
- Bona fide place of business for 8(a) construction awards
 - 8(a) firm regularly maintains office within SBA boundary with at least one employee working at least 20 hours/week there (no trailers or temporary construction sites)
 - Bona fide place of business established in state – eligible for entire state
 - Current contract performance in state – future state-wide eligibility
 - Multiple performance locations: location where majority of work performed (based on \$ value) for single award contracts; or any performance location for multiple award contracts

13 C.F.R. § 124.501

SDB GOALING INCREASES

- The Administration continues pursuing a policy (adopted in 2021) of year-by-year increases in the Small Disadvantaged Business contracting goal
 - Goal in previous fiscal year was 11% of prime contracting dollars
 - Goal in current fiscal year is 12% of prime contracting dollars
 - Intent is to raise goal to 15% by 2025
- SDB goal encompasses both certified 8(a) companies and self-certified SDBs

SDB GOALING INCREASES

- To help reach the 15% goal, the Administration directed the SBA to negotiate agency-by-agency SDB goals
 - Aggregate of agency-by-agency goals must equal 12% in current fiscal year
 - Previously, SBA gave each agency “one size fits all” SDB goals, regardless of agency’s prior achievement
 - However, “one size fits all” continues for WOSB, SDVOSB and HUBZone
- SBA proposes option for SDB status protests

OMB MEMO

- Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
 - **Rule of Two:** “Apply the rule of two to contract orders, with limited exception.”
 - Work with agency small business specialists early
 - Use On-Ramps, Limit Off-Ramps
 - “Maximize orders to small businesses under the simplified acquisition threshold (SAT) to the maximum extent practicable.”
 - Make BICs (Best in Class) work for small business.

Proposed 8(a) Updates

PROPOSED RULE

- Aug. 2024 SBA issued a proposed rule that effects multiple programs (further info on this in later slides).
- For the 8(a) Program, it appears SBA is loosening some restrictions. Some examples:
 - SBA aims to make “ownership requirements for partnership to be identical for the 8(a) BD, WOSB and VetCert programs.”
 - Changes to prior approval requirements for ownership.
 - Updates to showing primary industry in the initial application
 - Changes to “good character” requirements
 - Less stringent reapplication timelines.



HUBZone & SDVOSB Program

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HUBZone Proposed Updates

PROPOSED RULE (Pt. 1)

- Part of the Aug. 2024 SBA proposed rule.
- For the HUBZone Program SBA aims to:
 - Increase the requirement that HUBZone employees work a minimum of 40 hours per month to 80 hours per month; and eliminate “in-kind employees.”
 - Limit HUBZone companies to having one legacy employee at a time.
 - A “proposed § 126.601(a) would require a firm to be both a certified HUBZone small business and one that continues to be eligible as of the date of its offer for a HUBZone contract. In light of this change, the rule also proposes to amend § 126.500 to require firms to recertify to SBA every three years, rather than annually.”
 - “Attempt to Maintain” Rule update: Firm must meet the 20% minimum in the first year after contract award and 35% *on each certification date* after the first year.

HUBZone Proposed Updates

PROPOSED RULE (Pt. 2)

- Aug. 2024 SBA proposed rule (Continued):
 - Change status protest requirements to specify that only other HUBZone businesses would be able to protest another HUBZone company's HUBZone status. (Of course, SBA or CO could bring their own protest).
 - For “Principal Office” SBA would “require firms to provide a lease that commenced at least 30 days prior to the date of SBA’s review and ends at least 60 days after the date of SBA’s review.”
 - 10-Year “long-term investment” Rule clock would start “on the firm’s recertification date that follows the execution of the lease or deed.”
 - Price Evaluation Preference Update: Add examples in regulations about how a business would show “a non-HUBZone small business concern is not affected by the application of the HUBZone PEP where such non-HUBZone small business is not the lowest offeror prior to the application of the preference.”

SDVOSB Program Updates

SDVOSB CERTIFICATION

- 2021 NDAA eliminated SDVOSB self-certification for non-VA contracts
 - Now, can only self-certify for subcontract and SDVOSB goals
- VA CVE transferred to SBA January 1, 2023; SBA verifies SDVOSBs government-wide through “VetCert”
- One-year “grace period” for self-certified SDVOSBs ended 12-31-23
- NOTE: Certify website was down for September.

VETCERT STATUS PROTEST

- OHA Sustains Status Protest
 - Self-Proclaimed SDVOSB Awardee Not Certified by VetCert
 - Not Eligible For SBA's Grace Period: submitted your complete application to SBA through VetCert prior to December 31, 2023, and be currently waiting for approval or denial
 - Not Veteran Owned or Controlled
 - Mckenna Brytan Indus. LLC, SBA No. VSBC-334, 2023 (Feb. 8, 2024)



Joint Ventures & Teaming

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JV MANAGEMENT

- Non-Managing JV Partner can veto:
 - Initiating contract litigation for the JV
 - Deciding contract opportunities for the JV
- Important insight for those forming joint ventures, as it has not been clear from past SBA precedent
- Strategic All. Sols. LLC, SBA No. VET-278, 2023 (Jan. 12, 2023); 13 C.F.R. 121.103; 13 CFR § 125.8

JV ACTIONS CASE

- Managing venturer and partner had equal representation on JV management committee
 - Mgmt. Committee controlled all actions
 - Mentor could block ordinary actions because majority vote needed
 - Protégé not in control
 - LS3, LLC v. United States, No. 23-1392, 2023 WL 8638647 (Fed. Cl. Dec. 14, 2023)

SMALL BUSINESS AFFILIATE PAST PERFORMANCE

- 2024 NDAA
 - By July 1, 2024, DFARS Update
 - “require that when small business concerns bid on [DoD] contracts, the past performance evaluation and source selection processes shall consider, if relevant, the **past performance information of affiliate companies** of the small business concerns.”
 - Will this apply to entity-owned 8(a) Program participants, who are not affiliated with related companies?

JV FACILITY CLEARANCE

- Oct. 2023 DoD Memo
 - Infopoint LLC, B-419856 (Aug. 27, 2021): NDAA prohibits DOD from requiring that JV hold a facility clearance if the members of JV hold required facility clearances
 - DoD Memo creates confusion. “[I]f the JV is established by contract (not a separate legal entity), is unpopulated” then it does not need its own FCL, but what if it is a separate legal entity?

Teaming Agreement

TA DECISION

- Solicitation required, “enforceable teaming agreement must be in place with one or more small businesses” for SB participation credit
- Must include “percentage of the total contract to be subcontracted.”
- TA said “for up to” certain SB %, instead of a simple %.
- Protest sustained, TA was noncompliant
 - Global Patent Solutions, LLC, B-421602.2 (Feb. 23, 2024),

Proposed JV Regulation Updates

PROPOSED RULE

- As part of the Aug. 2024 proposed rule, SBA proposed updates to JV Past Performance.
 - SBA is proposing that the agency can “require some past performance at a dollar level below what would be required of joint venture mentor partners or of individual offerors.”
 - Proposed language of 13 C.F.R. § 125.8 would make clear that the agency can’t require the protégé member of the joint venture to meet the same past performance or experience requirement as the mentor or offerors generally. It also seems to say that an agency can require no protégé experience, and that is acceptable.



SBA Size & Affiliation Updates

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OSTENSIBLE SUBCONTRACTOR

- Meeting limitations on subcontracting = **defense** against ostensible subcontractor affiliation
 - Prime contractor is performing the primary and vital and not unduly reliant
- Applies to most contracts
 - services
 - specialty trade construction
 - supplies
- But for general construction: prime must superintend, manage, and schedule the work
 - 15% limitation on subcontracting so low subcontractor could “subcontract out all the supervision and oversight responsibilities to another business entity”

OSTENSIBLE SUBCONTRACTOR

- Regulation now refers to two of four *Dover Staffing* factors for ostensible subcontractor rule
 - 1. Reliance on incumbent management
 - 2. Reliance **solely** on subcontractor experience
- *But*: prime can use experience and past performance from incumbent subcontractor “to enhance or strengthen its offer” in proposal without finding affiliation.

LIMITATIONS ON SUBCONTRACTING

- Contractor violating LOS gets “opportunity to explain any extenuating or mitigating circumstances that negatively impacted its ability to do so.”
- **CPARS Impact:** If no mitigating circumstance, or concern’s failure to meet the limitations was within its control, agency can’t “give a satisfactory or higher past performance rating for the appropriate factor or subfactor in accordance with FAR 42.1503.”
- Circumstances:
 - unforeseen labor shortages
 - scope changes
 - unexpected changes to subcontractor’s SSE status
 - force majeure events

13 C.F.R. 125.6(e)

MANUFACTURER DEFINITION

- SBA clarified how to establish a company as a product manufacturer by defining what it means to use "its own facilities"
- Doesn't require ownership of the facilities—a lease can be enough: "contractor need only occupy and control the facilities, if not as an owners, then as a lessor or tenant."
- Don't need: fully executed lease of proposed manufacturing premises at time of proposal
- Do need: written agreement between company and landlord in place at time of proposal for company to occupy/ control facilities used to manufacture end item
- In this case, TA and proposal didn't suffice—amounted to "nothing more than an agreement to come to an agreement."

Master Boat Builders, Inc., SBA No. SIz-6198 (2023)

INFORMATION TO USE IN SIZE CALCULATION

- It has long been SBA's position that they can only consider tax returns, when calculating a small business' size (for a receipts-based standard).
- However, a Federal District Court case introduced some doubt into this long held standard, holding that Contractors must in some cases consider information outside their tax returns.
- False Claims Act case, and the offeror at issue was alleged to have misreported its receipts by improperly subtracting expenses that it shouldn't have subtracted.
- District Court noted that SBA will mostly rely on the information a bidder provided but may use other information and may make requests for additional information.
- No SBA case has seemed to cite to this decision, and doesn't overturn size determination precedent, as it is a False Claims Act case, but could give SBA an idea for expanding its reach in a size determination.

United States ex rel. Bid Solve, Inc. v. CWS Mktg. Grp., Inc., 678 F. Supp. 3d 53 (D.D.C. 2023).

PROPOSED RULE

- As part of the Aug. 2024 proposed rule, SBA proposed new Size Recertification regulation at 13 C.F.R. § 125.12.
 - Would create a requirement for contractors to recertify size (and status) within 30 days of a merger, acquisition, or novation (no apparent exceptions for GSA Schedule).
 - This is contrary to SBA and GAO precedent (See Lintech Global Inc., SBA No. SIZ-6287 (May 26, 2024))
 - Re-affirms the need to recertify at the five-year mark of the contract.
 - If a business is found as other than small as part of a required recertification, or no longer the applicable socio-economic status, that business will be “ineligible to submit an offer for a set aside or reserved award under a multiple award contract after the triggering event occurs.”
 - JV can recertify as small if “all parties to the joint venture qualify as small at the time of recertification, or the protégé small business *in a still active mentor-protégé joint venture* qualifies as small at the time of recertification”



Miscellaneous Updates

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GAO BID PROTESTS: FY2023

- 2025 cases and 1957 protests filed
 - Up 12% from FY 2022 but down from 2198 cases in FY 2018
- Sustain rate = 31%
- But effectiveness rate: (sustain + corrective action)
= **57%**
 - Up a bit from FY 2022 (51%), higher than other recent years (44% - 51%)
 - CIO-SP4 was over 200 sustained protests of one procurement

SBA PROTEST COUNT

- **OIG Report: OHA Statistics for FY 2021**
 - 364 decisions total (Not including SDVOSB protests)
 - 327 size protests
 - 37 status protests
 - 18 SDVOSB (not including OHA), 12 HUBZone, 7 WOSB
 - Over 1/3 protests not dismissed found ineligible contractor

SBA GOALING SCORECARD: FY2023

- Small business prime contract spending was \$178.6 billion
- 28.35% of prime contracting dollars to small businesses, exceeding 23% goal and FY 2022 achievement (26.5%)
- Government (barely) met 12% SDB goal, with 12.1%; this exceeded FY 2022 achievement (11.38%)
- SDVOSB goal met, WOSB and HUBZone goals not met
 - WOSB: \$30.9 billion; 4.91%; under 5% goal (higher than 2022). 11th straight year WOSB goal not met
 - HUBZone: \$17.5 billion, 2.78%; under 3% goal (higher than 2022). 12th straight year HUBZone goals not met.
- Total small business contractors fell again 2.19%, from 62,670 to 61,298.

APPEALS BOARD CASES

- **CBCA:** many CBCA appeals settle, for those not ending in settlement or dismissal, about 45% result in some victory for contractor
 - Default: Cure language didn't properly put the contractor on notice that the CO sought plan for how contractor would "receive and process orders in the future and that, by the date of the cure notices, [contractor] had no delinquent orders to support a default termination." Alan E. Fricke Memorials, Inc. v. Department of Veterans Affairs, CBCA 7352, et al. (Jan. 12, 2023)
- **ASBCA:** docketed 342 cases in 2023, a 5-year low
 - Of those not dismissed, high sustain rate of 67%

SBA Mentor Protégé Updates

PROPOSED RULE

- As part of the Aug. 2024 proposed rule, SBA proposed Changes to the Mentor Protégé Program.
 - “Mentor” definition will be updated to explicitly state Mentor must be for-profit business.
 - SBA would add clarifying language to the new 13 C.F.R. § 125.9(c)(4)(iv) to make clear that a concern cannot be a protégé for a total of more than 12 years.
 - Rule proposes that a new provision be created to allow the Protégé to have a voice in whether it wants to continue the mentor-protégé relationship if Mentor is acquired
 - Protégé would be permitted to either negotiate a revised mentor-protégé agreement with the purchasing firm or terminate the relationship if the protégé believes the purchasing firm is not a good fit.
 - If a mentor ends up with two mentor-protégé joint ventures that are both awardees on the same multiple award contract, the mentor will be required to terminate one of the relationships.
- **ALSO NOTE:** SBA has been getting *more strict* on MPA language lately.

The End of *Chevron*

CHEVRON DEFERENCE

- *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).
 - Historically, *Chevron* deference was as follows: If a federal statute was ambiguous or otherwise didn't expressly address a certain issue, courts would defer to a federal agency's interpretation of those statute provisions so long as those interpretations were reasonable (even if the court otherwise disagreed with that interpretation)
 - Under this SCOTUS decision *Chevron* deference was altered or no longer exists as it was. Courts no longer must defer to agency interpretations of federal statutes.
 - NOTE: *Chevron* deference concerned agency interpretations of federal statutes, not regulations. There is a separate case, *Auer v. Robbins*, which holds that courts will defer to agency's interpretations of their own regulations. That case remains in good standing.

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SBA Small Business Size and Affiliation Rules

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The 8(a) Program

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Volume 4: Second Edition

SHANE J. MCCALL



Procedures and Pitfalls of Size Protests and Appeals

A Guide to Size Protests & Appeals - In Plain
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Volume 5

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