



U.S. Small Business
Administration

Legislative & Regulatory Update

For Small Business Government Contracting
Programs

February 24, 2021

Legislative Action

National Defense Authorization Act for Fiscal Year 2021

[Pub. L. 116-283, H.R. 6395 \(Conference Report\)](#), passed over veto 1/1/21

- **Sect. 862.** Transfer of verification of small business concerns owned by veterans or service-disabled veterans to the Small Business Administration - Requires transfer of the certification program within two years.
- **Sect. 863.** Employment size standard requirements for small business concerns - Extends the averaging period for SBA's employee-based size standards from 12 months to 24 months, effective one year after enacted.
- **Sect. 864.** Maximum award price for sole source manufacturing contracts - Raises the statutory sole-source threshold for manufacturing contracts in the 8(a), WOSB, HUBZone, and SDVOSB programs to \$7 million.
- **Sect. 865.** Reporting requirement for expenditure amounts for the Small Business Innovation Research Program and the Small Business Technology Transfer Program - Require a report to Congress on SBIR/STTR agencies' program expenditures.
- **Sect. 866.** Small businesses in territories of the United States - Defines a covered territory and extends surplus property and mentor-protégé benefits to covered territories.

NDAAFY2021 (cont.)

[Pub. L. 116-283, H.R. 6395 \(Conference Report\)](#), passed over veto 1/1/21

- **Sect. 868.** Past performance ratings of certain small business concerns - Permits small businesses that performed contracts through a joint venture or as a first-tier subcontractor to use that past performance toward offers as a prime contractor.
- **Sect. 869.** Extension of participation in the 8(a) program - Allows 8(a) participants participating on or before Sept. 9, 2020 to extend their 8(a) participation for one year, regardless of whether they had suspended their program term.
- **Sect. 870.** Compliance of Offices of Small and Disadvantaged Business Utilization - Requires OSDBUGs to report remedial actions to Congress if found by GAO to be out of compliance with section 15(k) of the Small Business Act.
- **Sect. 871.** Category Management training - Requires SBA and OFPP to develop a training curriculum on category management and avoiding conflicts with the Small Business Act.

Recent SBA and FAR Regulatory Action

Final Rule: Consolidation of Mentor Protégé Programs and Other Government Contracting Amendments

[85 FR 66146](#)

- Proposed rule published Nov. 8, 2019 (84 FR 60846)
 - Initial 70-day comment period extended additional 21 days to Feb 21, 2020
 - Tribal consultations held in Minneapolis, Anchorage, Albuquerque, and Oklahoma City
 - SBA received 189 comments
- Final Rule
 - Published October 16, 2020
 - Effective November 16, 2020

Final Rule: Consolidation of Mentor Protégé Programs (cont.)

[85 FR 66146](#)

- Combines 8(a) MPP and ASMPP
- Changes to M/P program
 - MPA generally will not count if terminated within 18 months
 - Does not require mentor good character in every instance
 - Mentor cannot submit competing offers
 - Does **not** adopt proposal to limit mentors to revenues less than \$100 million
 - Protégés from Puerto Rico don't count for 3 limit, up to 2 (NDAA2019)
 - Eliminates reconsideration
 - Implements changes to M/P annual evaluations

Final Rule: Consolidation of Mentor Protégé Programs (cont.)

[85 FR 66146](#)

- Changes to joint venture rules:
 - Eliminates SBA approval for competitive 8(a) JV
 - 3-in-2 rule to 2 years
 - Measures to restrict changes in JV partners **not** adopted
 - Facility Security Officers may be administrative personnel
 - JV contract awards requiring a facility clearance
 - Clarification as to size of JV partners
- MACs, NAICS codes and eligibility
 - Assign single NAICS code to each order—must be included in underlying MAC
 - Except for FSS, eligibility for SB order on unrestricted MAC based on time of offer for order
 - Same for required order status that differs from the underlying contract
 - Final rule clarifies the use of reserves or pools – size and status flow down to orders

Final Rule: Consolidation of Mentor Protégé Programs (cont.)

[85 FR 66146](#)

Changes to 8(a) rules:

- Defines follow-on requirement
 - Buying activity must notify SBA where work previously performed through 8(a) program will be performed through a different means
 - SBA Administrator may appeal a determination that work previously performed as 8(a) contract is "new"
- More clarity on immediate family member participation
- Prior-SBA approval for change of ownership not needed:
 - Insertion/deletion of holding company as between Participant and ANC/tribe
 - All non-DVDs involved in transaction own >20% before and after the change
 - DVD individual (entity) will increase his/her (its) ownership interest
- Appeal process for changes in primary NAICS code
- Re-apply after decline after 90 days
 - Final rule added 12 month waiting period where a concern has been declined 3 times within 18 months of the date of the first final agency decline decision

Final Rule: Consolidation of Mentor Protégé Programs (cont.)

[85 FR 66146](#)

Changes to 8(a) rules (cont.):

- Bona fide place of business
 - Timeframes for bona fide place of business (at least 20 days before offer, review within 15 days of request).
 - Expands applicable geographic scope to include Metropolitan Statistical Areas and contiguous counties (in the same or a different state)
 - Allows a concern to submit an offer for a construction requirement if the request is made timely (I.e., at least 20 working days before offers are due) even if SBA approval has not occurred
 - Clarifies that BFPOB applies to competitive and sole source 8(a) construction contracts
- Limit on sole-source awards changed to \$100 million in all cases

Final Rule: WOSB Certification Program

[85 FR 27650](#)

- The rule eliminates self-certification for WOSB/EDWOSB set-aside and sole-source contracts.
 - WOSB set-aside and sole-source contracts are procurements with a WOSB-eligible NAICS code.
 - EDWOSB set-aside and sole-source contracts are procurements with an EDWOSB-eligible NAICS code.
- To be eligible for a WOSB/EDWOSB sole-source contract, the firm must be certified through one of the three prescribed options (SBA, an authorized government entity, or an approved TPC).
- To compete for a WOSB/EDWOSB set-aside contract, the firm must either be certified or have submitted a complete application for certification. SBA will expedite review of applications for a firm that has a pending application and is the apparent successful offeror on a contract.

Final Rule: WOSB Certification Program (cont.)

[85 FR 27650](#)

- A firm can:
 - Submit an application to SBA,
 - Submit documentation of certification by 8(a) or the VA's CVE, or
 - Submit an application to an SBA-approved third-party certifier (TPC)
- Self-certified WOSBs that want to be eligible for WOSB/EDWOSB awards should download their documentation housed in the WOSB Program Repository and submit an application for certification through one of the above options.
- Self-certified WOSBs performing on contracts posted before October 15, 2020 can perform on those for the life of the contract in accordance with SBA's rules for recertifying on long-term contracts.
- Self-certification remains for subcontracting credit and goaling purposes.

Final Rule: WOSB Certification Program (cont.)

[85 FR 27650](#)

The new regulations include:

- Procedures for how WOSBs/EDWOSBs will submit an application for certification and how they will maintain certification.
 - Three-year cycle.
- The timeline and process for firms seeking to re-apply after a declination.
 - A declination can't be appealed, but a firm that comes into compliance with program requirements can re-apply 90 days after a declination.
- New oversight procedures for third-party certifiers.

Final Rule: WOSB Certification Program (cont.)

[85 FR 27650](#)

Other changes:

- Aligns the economic disadvantage thresholds between the EDWOSB and 8(a) Business Development Programs.
 - Established a \$750,000 personal net worth standard for economically disadvantaged individuals in the 8(a) program. This matches the standard in place for EDWOSBs.
 - Revised both programs' regulations so that qualified retirement accounts are backed out of the personal net worth calculation for an economically disadvantaged individual, regardless of age.
- 8(a) firms that are owned and controlled by one or more women are eligible for certification as EDWOSBs.

Class Deviations: WOSB Certification Program

- Some agencies have issued Class Deviations to recognize WOSB certification
 - [Department of Defense](#)
 - [NASA](#)
- The deviations require CO to verify status in SBA's DSBS status when using WOSB/EDWOSB set-aside or sole source.
 - Firm can have application pending at offer on WOSB/EDWOSB set-aside
 - CO will email SBA to seek priority review for a pending application
- Other agencies may issue Class Deviations based on [CAAC Letter 2021-01](#).
 - [GSA](#)

WOSB Certification Program

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SBA SBA Profile

"Business Development Servicing Office" (for certifications)
ALASKA DISTRICT OFFICE (SBA office code 1084)

SBA Federal Certifications

8(a) Certification:
SBA 8(a) Case Number:
SBA 8(a) Entrance Date:
SBA 8(a) Exit Date:

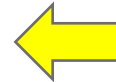
HUBZone Certification:
HUBZone Certified?: Yes No
HUBZone Certification Date:

8(a) Joint Venture Certification:
8(a) JV Entrance Date:
8(a) JV Exit Date:

Women Owned - SBA Certified:
WOSB Certified?: Yes No
WOSB Certification Date:
WOSB Pending?: Yes No

Economically Disadvantaged Women Owned - SBA Certified:
EDWOSB Certified?: Yes No
EDWOSB Certification Date:

Other Certifications



Final Rule: HUBZone Comprehensive Review

84 FR 65222

- HUBZone maps, currently frozen through 12/31/2021, will be updated in 2022 based on 2020 Census, then updated every 5 years.
 - *No extension beyond 2021 for current Redesignated Areas.*
- Requires firms to annually recertify.
- Once certified, a firm will be eligible for all HUBZone contracts for which it qualifies as small, for a period of one year from the date of certification.
 - Program exams are required at least every 3 years.
 - *Annual recertification requirement was suspended until 10/1/2020 due to COVID.*
- Requires firms to be HUBZone-certified in DSBS at time of **offer only** (not award).
 - Protests relate back to date of certification or most recent recertification.
- Requires firms performing a HUBZone contract to “attempt to maintain” 35% employment of HUBZone residents.
 - “Attempt to maintain” means at least 20%.
- Applications will be processed within 60 days of receipt of complete package.
 - *Expedited certification for COVID-19-related solicitations until March 31, 2021.*

Direct Final Rule: Governor-Designated Covered Areas

[84 FR 65222](#)

- Added new type of HUBZone: “Governor-Designated Covered Area”
 - Non-urbanized areas of 50,000 or less
 - Unemployment of at least 120% the state or US average
 - Opportunity Zones encouraged
 - Governors must petition SBA

Proposed Rule: Size Standards for Education Services; Health Care and Social Assistance; Arts, Entertainment and Recreation; Accommodation and Food Services; Other Services

[85 FR 72584](#)

- Reviewed 145 size standards in sectors 61, 62, 71, 72, and 81
- Proposed to increase 70 of them:
 - 14 industries in NAICS Sector 61 (Education Services)
 - 18 industries in Sector 62 (Health Care and Social Assistance)
 - 11 industries in Sector 71 (Arts, Entertainment and Recreation)
 - 4 industries in Sector 72 (Accommodation and Food Services)
 - 23 industries in Sector 81 (Other Services)

Proposed Rule: Size Standards for Professional, Scientific and Technical Services; Management; Administrative and Support and Waste Management and Remediation Services

[85 FR 72584](#)

- No proposed decreases
- Reviewed 48 prof., sci., tech. servs. standards, proposed to increase 27
- Proposed to increase both management standards
- Reviewed 44 admin., support, waste management/remediation standards; proposed to increase 17
- Would add 2,600 small businesses

Proposed Rule: Size Standards for Agriculture, Forestry, Fishing and Hunting; Mining, Quarrying, and Oil and Gas Extraction; Utilities; Construction

[85 FR 62239](#)

- No proposed decreases
- Reviewed 64 agricultural standards, proposed to increase 60
- Reviewed 4 mining/oil standards, proposed to increase 3
- Proposed to increase all 3 utilities standards reviewed
- Reviewed 32 construction standards, proposed to increase 2
- Would add 49,400 small businesses (almost all in agricultural)

Proposed Rule: Size Standards for Transportation and Warehousing; Information; Finance and Insurance; Real Estate and Rental and Leasing

[85 FR 62372](#)

- No proposed decreases in size standards
- Reviewed 43 transportation/warehousing standards, proposed to increase 25
- Reviewed 19 information standards, proposed to increase 8
- Reviewed 39 finance/insurance standards, proposed to increase 10
- Reviewed 25 real estate standards, proposed to increase 9
- Would add 1,790 small businesses (half from real estate)

FAR Final Rule: Inflation Adjustment of Thresholds

[85 FR 62485](#)

- Subcontracting plan threshold raised from \$700,000 to \$750,000;
- 8(a) sole-source thresholds raised from \$7 million to \$7.5 million, and \$4 million to \$4.5 million;
- 8(a) sole-source J&A threshold raised from \$22 million to \$25 million;
- HUBZone sole-source thresholds raised from \$7 million to \$7.5 million, and \$4 million to \$4.5 million; and
- WOSB sole-source thresholds raised from \$6.5 million to \$7 million, and \$4 million to \$4.5 million.
- SDVOSB manufacturing sole-source threshold raised to \$7 million.

Other Developments

The Tolliver Group, Inc. v. United States (Ct. Cl. 2020)

- Court decision by Judge Matthew Solomson of U.S. Court of Federal Claims
- Like [*Mori Associates*](#), involved whether to apply Rule of Two on FAR 16.5 task orders

Brief Facts

The Army's Fort Sill canceled a GSA Schedule SDVOSB set-aside for training services. Instead of setting aside the requirement, the Army elected to compete its requirement on a non-set-aside multiple-award IDIQ contract previously awarded by the Army. The Army's IDIQ contract has only large business competitors. Two SDVOSBs, Tolliver and PTP, protested to the Court of Federal Claims.

“Plaintiffs essentially contend that an agency must apply the Rule of Two *before* an agency can even identify the possible universe of procurement vehicles which may be utilized for a particular scope of work. The Court agrees.”

The Tolliver Group, Inc. v. United States (Ct. Cl. 2020)

Outcome

- The Rule of Two unambiguously applies to “any” “acquisition,” without any loophole for multiple-award IDIQ task orders.
- Section 644(r), which grants discretion to set aside task orders, does not lead to the conclusion that the agency may dispense with the rule of two.
- Just because the agency may have satisfied the Rule of Two with respect to the contract-level IDIQ does not mean the agency has also satisfied its obligations with respect with specific requirements at the order level.

“In sum, the government’s failure to apply the Rule of Two prior to deciding to cancel the solicitations at issue is fatal to that decision, whether because that failure undermines the central rationale of the cancellation decision or whether because the decision to move the work to the TMS MAIDIQ prior to conducting a Rule of Two analysis constitutes an independent violation of law.”



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