



U.S. Small Business
Administration

Legislative & Regulatory Update

**For Small Business Government Contracting
Programs**

March 18, 2022

Legislative Action

National Defense Authorization Act for Fiscal Year 2022

[Pub. Law 117-81](#), signed by the President on 12/27/21

Sect. 861 - Keeps the Miller Act threshold for bonding protection for small-business subcontractors on construction projects at its present level, instead of raising it for inflation.

Sect. 863 - Requires update to SAM.gov for small business status changes and notification to agencies where the firm has a pending offer, if the change would affect eligibility.

Sect. 864 - Gives OHA jurisdiction over HUBZone appeals.

Sect. 866 - Requires DoD report on CMMC effects on small business.

The Price Act

Promoting Rigorous and Innovative Cost Efficiencies for Federal Procurement and Acquisitions Act of 2021

[Pub. Law 117-88](#), signed by the President on 2/22/21

- DHS operates a Procurement Innovation Lab aimed at experimenting with innovative acquisition techniques
- Directs DHS to issue an annual report on innovative procurement techniques, including those used to meet small-business goals.
 - Sunsets after 3 years
- Requires OMB to convene the Chief Acquisition Officers Council to examine best practices in acquisition innovation, including in contracting with small businesses
 - CAO Council may form a working group to address
 - CAO Council (or the working group) must issue a report on innovative acquisition techniques that lead to meeting or exceeding small-business goals

Introduced in the House

- [H.R. 4697](#), to strike section 8(a)(11), which is the basis of [bona-fide-office rule](#) in the 8(a) program
 - SBA has temporarily waived the requirement: [SBA Announces Moratorium on Bona Fide Place of Business Requirements for the 8\(a\) Business Development Program](#)
- [H.R. 6347](#), Military Spouse Entrepreneurs Act of 2021 – to establish a 5-year pilot procurement program for small businesses owned and controlled by military spouses, with a 5% goal
- [H.R. 6504](#), Native Pacific Islanders of America Equity Act - to define a Native CHamoru Organizations as a nonprofit corporation owned by Guam natives or direct ancestors, define Native Northern Marianas Organizations, and give such organizations the same treatment as Native Hawaiian Organizations for SDB and HUBZone eligibility.
- [H.R. 6923](#), the Accelerating Small Business Growth Act - create a grant program to help transportation agencies carry out innovative programs to compete for federally funded transportation projects.

Executive Action

OMB Memorandum: Advancing Equity in Procurement

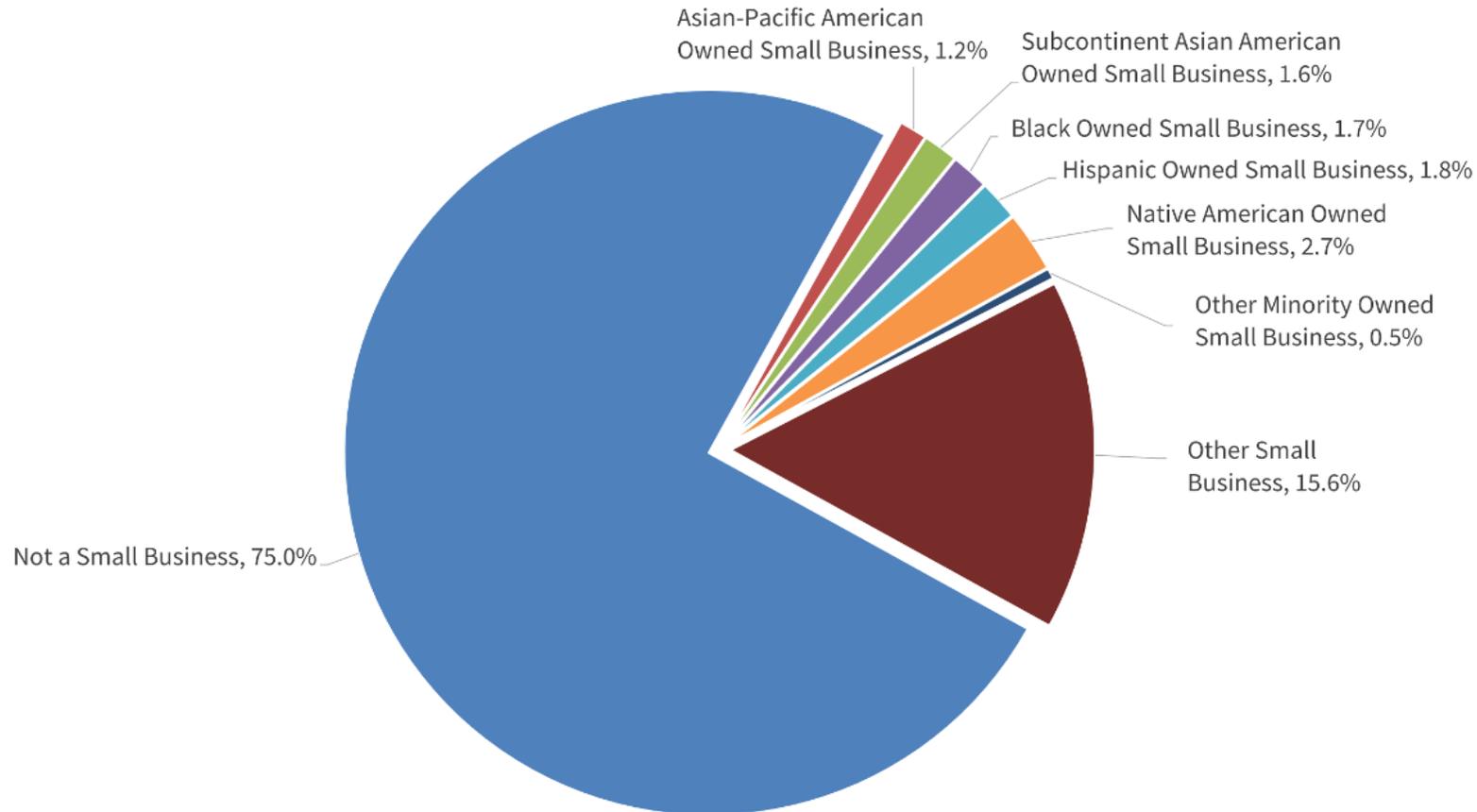
M-22-03, Dec. 2, 2021 – implementing Executive Order 13985

1. Raises governmentwide SDB contracting goal to 11% for FY22, on the way to 15% by 2025.
2. Implements major changes to Category Management.
 - A. automatic Tier 2 credit for socioeconomic small businesses (SDB, WOSB, HUBZone, SDVOSB)
 - B. reinforced importance of small-business goal achievements
 - C. making SBA and Dept. of Commerce voting members on the Category Management Leadership Council.
3. Seeks to increase new entrants and reverse the decline in the small business supplier base.
4. Makes Federal senior managers accountable for small business contracting goals.
5. Ensures OSDBUGs have access to senior leadership

SBA Disaggregated Data Release

[SBA.gov](https://www.sba.gov) – as discussed on [whitehouse.gov](https://www.whitehouse.gov) and [analyzed by CEA](#)

FY 2020 Federal Contracting¹ by Race² and Business Size



1. Includes only small-business-eligible dollars (\$559 billion in FY 2020). This includes all Federal contracts except those excluded by SBA's Goaling Guidelines. This data does not apply the double-credit and subcontracting adjustments required by statute for SBA's annual scorecard.

2. Racial and ethnic categories are reflected here as they appear in the System for Award Management when an entity registers to do business with the government. Classifications are self-reported. The other small business category reflects those firms who did not report as being minority-owned.

DoD Report: State of Competition in Defense Industrial Base

[Press release](#), [Full report](#) (February 2022)

- Defense sector has consolidated from 51 to 5 defense prime contractors since the 1990s.
- Small businesses in the DIB have shrunk 40%,
 - Could lose an additional 15,000 SBs in the next 10 years without action
- Steps to increase competition within the industrial base:
 1. Strengthen merger oversight
 2. Address intellectual property limitations
 3. Increase new entrants through vehicles such as Other Transactions and Commercial Solutions Openings
 4. Increase opportunities for small business
 5. Implement sector-specific supply chain resiliency plans

Recent SBA and FAR Regulatory Action

Direct Final Rule: Definition of Surviving Spouse/Change to Sole-Source Thresholds

[86 FR 61670](#), Effective 2/7/22

- Allows surviving spouse of deceased service-disabled veteran to qualify as owner of SDVOSBC for up to:
 - 10 years after veteran's death, if veteran was 100% disabled
 - 3 years after veteran's death, for less than 100% disability
- Changes 8(a) sole-source J&A threshold to \$100 mil for DoD, \$25 mil for civilian
 - Applies to entity-owned (ANC/Tribe for DOD & civilian agencies; NHO for DOD only) firms and
 - Applies if only one eligible Participant would submit a fair-market offer
- Changes sole-source thresholds in 8(a), WOSB, and HUBZone to:
 - \$4.5 mil for nonmanufacturing (but still \$4 mil in SDVOSBC)
 - \$7 mil for manufacturing (same for SDVOSBC)

SBA Proposed Rule: Calculation of *Employee-Based* Size Standards

[86 FR 60396](#)

- Proposes to use a 24-month average to calculate a business's number of employees for eligibility purposes in all of SBA's programs
- Proposes to permit businesses in SBA's loan and SBIC programs to use a 5-year averaging period, in addition to the existing 3-year averaging period, for the purposes of calculating annual average receipts
- Comments closed 12/2/21

SBA Proposed Rule: Past Performance Ratings for JV members and Subcontractors

[86 FR 64410](#)

- Proposes to let small business use past performance from a joint venture, provided it worked on the joint venture's contracts
- Proposes to let a small business use past performance from a first-tier subcontract to go after a prime contract
 - Requires a change to subcontracting plans to direct primes to provide a rating to the small business within 15 days
 - Requested comment on whether to require a time frame within which the small business must make the request (e.g., during the prime's period of performance)
- Comments closed 1/18/22

Nonmanufacturer Rule Class Waivers: Proposed terminations

[87 FR 8628](#) (furniture); [87 FR 8630](#) (radiology equipment)

- SBA issued notices of intent to terminate class waivers of the nonmanufacturer rule for two classes of products:
 - Radiology equipment (CT/CAT scanners, X-ray)
 - Certain furniture products (factory, hospital, and laboratory, plus specified frames and parts)
- If finalized, the nonmanufacturer rule will apply to these products
 - For set-aside contracts—except small-business set-asides below the SAT—awardees must provide their own product or the product of a small-business manufacturer
 - SBA also is able to grant individual waivers for specific contracts

SBA Final Rule: Correction to M/P Final Rule

[87 FR 380](#) (Jan. 5, 2022)

- Final rule of October 16, 2020, revised § 121.103(h) to clarify how a joint venture partner must calculate its proportionate share of joint venture receipts.
- JV partner must include in its receipts the same percentage as the percentage corresponding to the JV partner's share of work performed by the joint venture.
- Because the regulations no longer allow JVs to be populated, some reasoned that a JV populated with its own separate contracting-performing employees does not qualify as a JV, and thus that a JV need not include in its own receipts its proportionate share of receipts and employees from populated JVs.
- That was not SBA's intent.
- Correction clarifies that a concern must **include in its receipts and employee count its proportionate share** of joint venture receipts and joint venture employees, respectively, **regardless of whether the joint venture is populated or unpopulated.**

SBA Final Rule: Effective Date of 13 CFR 127.355, added by WOSB Final Rule Published May 11, 2020

[87 FR 3421](#) (Jan. 24, 2022)

- Establishes the effective date for § 127.355, “How will SBA ensure that approved third-party certifiers are meeting the requirements?”
 - Monthly reports
 - Full compliance review at least every 3 years
- Effective date of that reg relates back to the OMB approval - May 3, 2021.

Notice of new WOSB Program NAICS Codes

[87 FR 15468](#) (March 18, 2022)

- SBA identified new NAICS codes for the WOSB program
- Underrepresented industries are qualified for EDWOSB set-asides/sole-source procurements
 - 113 underrepresented NAICS codes
- Substantially underrepresented industries are qualified for WOSB set-asides/sole-source procurements
 - 646 substantially underrepresented NAICS codes
- (increased total WOSB/EDWOSB NAICS from 444 to 759)
 - Effective 18 March 2022

FAR Final Rule: Limitations on Subcontracting

[86 FR 44233](#), effective 9/10/21

- Applies across all small business programs
- Calculated as a percentage of the overall contract amount to be spent by the prime contractor on subcontractors.
- Adds concept of a “similarly situated entity”—a small business subcontractor that has the same small business program status as that which qualified the prime contractor for the prime contract
- Nonmanufacturer rule does not apply to small business set-asides at or below the simplified acquisition threshold
- Waivers of the nonmanufacturer rule allowed for procurements under the HUBZone Program
- CAAC [Letter No. 2021-02](#) authorizes agencies to issue a class deviation to apply LOS exclusions for
 - Certain direct costs not provided by small business concerns (e.g., airline travel, cloud computing, mass media)
 - Work performed outside the United States on awards made pursuant to the Foreign Assistance Act of 1961, or work performed outside the United States required to be performed by a local contractor.

FAR Final Rule: Scope of PCR Review

[86 FR 44247](#), effective 9/10/21

- COs must provide the PCR a copy of any proposed acquisition package, at the PCR's discretion
- PCRs may recommend the set-aside or sole-source award to a small business; the breakout of discrete components, items, and requirements for competition; and ways to improve competition

FAR Final Rule: Good Faith in Small Business Subcontracting

[86 FR 44249](#), effective 9/10/21

- Provides examples of activities that contracting officers may consider when evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan.
- Requires prime contractors with commercial subcontracting plans to include indirect costs, with certain exceptions, in their subcontracting goals

FAR Final Rule: Consolidation and Bundling

[86 FR 61038](#), effective 12/6/21

- Requires the publication on SAM.gov of a notice, no later than 7 days before the solicitation, for
 - Substantial bundling, and for
 - Consolidation
- Requires the publication on SAM.gov of a determination, with the publication of the solicitation of
 - The rationale for substantial bundling, or that
 - Consolidation of contract requirements is necessary and justified

FAR **Proposed Rule**: Small Business Program Amendments

87 FR 10327

- Comments due April 25, 2022
- Size changes
 - Size determined at offer on a multiple-award contract, even if price not evaluated (e.g., two-step eval)
 - IT value-added reseller size standard of 150 employees
 - Allow status protests based on ostensible subcontractor
- Allow set-asides for socioeconomic programs where multiple-award contract was set aside for small business
- Cannot exercise an option past 5th year on an 8(a) contract if firm is no longer an 8(a) participant

FAR **Proposed** Rule: Update of HUBZone Program

[86 FR 31468](#)

- Published June 14, 2021
- Implements SBA's comprehensive revision (84 FR 65222)
 - Removes requirement for firm to be HUBZone qualified at both offer and award for HUBZone set-asides—instead just offer
- Authorizes sole source awards under SAT
- Comments closed 6/14/21

FAR **Proposed** Rule: WOSB Certification

[86 FR 55769](#), Published 10/7/21

- Would require agencies to check SBA's DSBS for WOSB/EDWOSB designation for WOSB/EDWOSB set-asides and sole-source awards
- Firms may submit offers on WOSB/EDWOSB set-asides if certification is pending
- Would remove mentions of the WOSB repository, which no longer exists



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