

# **COMPLIANCE & REGULATORY REQUIREMENTS IN FEDERAL SET-ASIDE PROGRAMS**

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## OVERVIEW

- ❖ Regulatory requirements for the following set-aside programs:
  - Small Business Program
  - HUBZone Program
  - 8(a) Business Development Program
  - Service-Disabled Veteran-Owned Small Business (SDVOSB) Programs
  - Women-Owned Small Business (WOSB) and Economically Disadvantaged Women-Owned Small Business (EDWOSB) Programs
- ❖ Compliance issues:
  - Presumed Loss Rule
  - Limitations on subcontracting
  - Contesting adverse past performance information
- ❖ Q&A



# **#1 ELIGIBILITY REQUIREMENT FOR ALL SET-ASIDE PROGRAMS: MUST BE A SMALL BUSINESS!**

- ❖ Small business status is determined by industry based on the size standards associated with the North American Industry Classification System (NAICS) codes found at 13 C.F.R. § 121.201
- ❖ Firms generally have a “primary” NAICS code, where the majority or plurality of their revenues are generated
- ❖ The size of a firm is determined by the average annual receipts of the firm over the three most recently completed fiscal years, or by the average number of employees for each pay period during the past 12 months (13 C.F.R. §§ 121.104, 121.106)



## AFFILIATION

- ❖ Size of a firm includes any affiliates
  - Multiple ways that affiliation can arise
  - Key is when one firm controls or has the power to control the other, or a third party or parties control or have the power to control both, even if this control is not exercised (13 C.F.R. § 121.103)
  
- ❖ Firms owned and controlled by Indian Tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), Community Development Corporations (CDCs), or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs, are **not** affiliates of such entities (13 C.F.R. § 121.103(b)(2)(i))



## **SET-ASIDE PROGRAMS: SMALL BUSINESS SET-ASIDES**

- ❖ **Contracts may be set aside exclusively for small business participation under an assigned NAICS code**
- ❖ **To be an eligible small business for a small business set-aside, the company must be small under the NAICS code and size standard assigned to the procurement**
  - **Small business status for a procurement is measured on the date you submit your proposal, with price**
  - **It is not necessary that your primary NAICS code be the same as the NAICS code assigned to the procurement**
  - **The procuring agency is responsible for selecting the NAICS code, but you can challenge it**
- ❖ **New opportunities for set-asides under MAS and FSS schedules**



## **SET-ASIDE PROGRAMS: HUBZONE PROGRAM**

- ❖ Designed to benefit “Historically Underutilized Business Zones”
- ❖ HUBZone designations are dependent upon a district’s income levels, unemployment rates, Difficult Development Area status (designated by HUD), base closure status, and Indian land status
  - Indian reservations are eligible HUBZones
- ❖ Competitive and sole source set-aside contract opportunities
- ❖ 10% price evaluation preference in full and open contract competitions, as well as subcontracting opportunities



## ELIGIBILITY REQUIREMENTS FOR THE HUBZONE PROGRAM

- ❖ Must be a small business
- ❖ Must be owned and controlled at least 51% by a U.S. citizen
  - Firms wholly owned by one or more Tribe, ANC, or CDC are also eligible to participate in the HUBZone Program
- ❖ “Principal office” must be located in a HUBZone
- ❖ At least 35% of employees must live in a HUBZone



## **ELIGIBILITY REQUIREMENTS FOR THE HUBZONE PROGRAM, CONT'D**

- ❖ **“Principal office” means the location where the greatest number of the concern’s employees at any one location perform their work (13 C.F.R. § 126.103)**
  - **However, for those concerns whose “primary industry” is service or construction, the determination of principal office excludes the concern’s employees who perform the majority of their work at job-site locations to fulfill specific contract obligations**
  
- ❖ **“Employee” means all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours per month**
  - **Includes temporary, leased, or “co-employed” employees**
  - **Also includes owner, even if no compensation is received**





## HOW TO OBTAIN AND MAINTAIN HUBZONE ELIGIBILITY

- ❖ Must apply to the SBA; application process generally takes three to six months
- ❖ Once admitted, there is no limit to the length of time you may participate in the Program, although required to recertify eligibility with the SBA every three years
  - You must report all “material changes” to the SBA that may affect your eligibility, such as changes in ownership, business structure, principal office, or failure to maintain 35% HUBZone residency requirement
- ❖ Must meet HUBZone eligibility requirements at time of offer and award of a HUBZone set-aside contract
- ❖ Can only joint venture with other HUBZone firms



## **SET-ASIDE PROGRAMS:**

### **8(A) BUSINESS DEVELOPMENT PROGRAM**

- ❖ Created to help small, disadvantaged businesses compete in the federal marketplace through contractual and business development assistance
- ❖ The 8(a) Program helps thousands of aspiring entrepreneurs gain a foothold in Government contracting
  - Offers a broad scope of assistance to firms that are owned and controlled at least 51% by socially and economically disadvantaged individuals
- ❖ Competitive and sole source set-aside opportunities
- ❖ Unique Mentor-Protégé Program and Joint Venture capabilities



## **ELIGIBILITY REQUIREMENTS FOR THE 8(A) PROGRAM**

- ❖ Business must be small and have the potential for success
- ❖ Business must be majority owned (at least 51%) and controlled by a socially and economically disadvantaged individual who is a U.S. citizen



## SOCIAL DISADVANTAGE

- ❖ Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identification as members of groups without regard to their individual qualities
- ❖ Individuals in the following groups are “presumed” to be socially disadvantaged:
  - Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans
  - Tribes, ANCs, NHOs, and CDCs are presumed to be socially disadvantaged



## SOCIAL DISADVANTAGE, CONT'D

- ❖ Individual is presumed socially disadvantaged if holds himself or herself out as a member of a presumed group and is currently identified by others as a member of the presumed group
- ❖ An individual not in a “presumed group” may still be eligible for 8(a) Program participation, on a case-by-case basis



## ECONOMIC DISADVANTAGE

- ❖ For initial 8(a) eligibility, the personal net worth (PNW) of a disadvantaged individual must be less than \$250,000, and average income over past three years must be less than \$250,000
- ❖ For continued 8(a) eligibility after admission to the Program, personal income, averaged over the past three years, may not exceed \$350,000 and PNW may not exceed \$750,000
- ❖ PNW excludes ownership interest in firm and equity in primary residence, except the SBA can include these when looking at the applicant's total assets; total fair market value of all assets may not exceed \$4 million for applicants, and \$6 million for participants



## ECONOMIC DISADVANTAGE, CONT'D

- ❖ While in the Program, owners may not take “excessive withdrawals”: excessive if in the aggregate during any fiscal year the Participant withdrawals exceed:
  - \$250,000 for firms with sales up to \$1,000,000
  - \$300,000 for firms with sales between \$1,000,000 and \$2,000,000
  - \$400,000 for firms with sales exceeding \$2,000,000



# HOW TO OBTAIN AND MAINTAIN 8(A) ELIGIBILITY

- ❖ Must apply to the SBA; application process generally takes six months to one year
- ❖ Participants granted a nine-year term, divided into two stages (four-year developmental stage, then five-year transitional stage)
- ❖ Maintain a balance between commercial and Government business, changes for each Program year
- ❖ Limit on the total dollar value of sole-source contracts that may be received while in Program: less of \$100 million or five times the size standard corresponding to its primary NAICS code (for receipts-based NAICS codes)





## **SET-ASIDE PROGRAMS: SDVOSB PROGRAMS**

- ❖ There are two programs for SDVOSBs, one through the SBA and the other through the VA
- ❖ Goals are to increase the Federal Government's contracting with military veterans and to assist veterans in the transition from active duty to civilian life
- ❖ Competitive and sole source set-aside opportunities
- ❖ The VA has a Mentor-Protégé Program; the SBA Mentor-Protégé Program coming soon
- ❖ Joint ventures with other small businesses



## **ELIGIBILITY REQUIREMENTS FOR THE SDVOSB PROGRAMS**

- ❖ **Must be a small business**
- ❖ **Must be owned by a Service-Disabled Veteran (SDV)**
- ❖ **The SDV must:**
  - **Have a service-connected disability as determined by the VA or DoD**
  - **Unconditionally own at least 51% of the SDVOSB**
  - **Control the management and daily operations of the SDVOSB**
  - **Hold the highest officer position in the SDVOSB and have the necessary experience to run the business**
  - **Manage the SDVOSB on a day-to-day basis and be the highest-compensated individual in the firm (the VA only)**



# HOW TO OBTAIN AND MAINTAIN SDVOSB ELIGIBILITY

- ❖ Self certification for the SBA Program
  - Must meet eligibility requirements on day of proposal submission
- ❖ For the VA Program, there is an application process that takes three to six months
  - Verified in [www.VetBiz.gov](http://www.VetBiz.gov) by the VA's Center for Veterans Enterprise
  - If verified by CVE, SDVOSBs may compete for contracts set aside by the VA – see 38 C.F.R. Part 74
  - Must be eligible at time of proposal and time of award
  - Re-verification every two years
  - Joint ventures must be separately verified by the VA



## **SET-ASIDE PROGRAMS: WOSB AND EDWOSB PROGRAMS**

- ❖ Companion programs for WOSBs and EDWOSBs
- ❖ Competitive set-asides, but no sole source awards yet
- ❖ Priority in 2013 to increase use of the WOSB/EDWOSB Programs
  - The SBA's "ChallengeHer" campaign to match WOSBs and EDWOSBs with agencies
  - 2013 NDAA lifted the \$6.5 million cap on set-aside competitions under the WOSB/EDWOSB Programs



## ELIGIBILITY REQUIREMENTS FOR THE WOSB PROGRAM

- ❖ Must be at least 51% owned and controlled by one or more women, and primarily managed by one or more women who are U.S. citizens
- ❖ Firm must be “small” in its primary industry in accordance with the SBA’s size standards for that industry
- ❖ Must be a firm that participates in an industry that has been identified by the SBA as one where WOSBs are substantially underrepresented
  - Not all NAICS codes apply



## **ELIGIBILITY REQUIREMENTS FOR THE EDWOSB PROGRAM**

- ❖ An EDWOSB is by definition a WOSB, so same eligibility requirements apply (and EDWOSBs may compete for WOSB opportunities)
- ❖ Additionally, in order for a WOSB to be deemed “economically disadvantaged,” its owners must demonstrate economic disadvantage
  - Personal net worth must be less than \$750,000, excluding ownership interest in firm and equity interest in personal residence
  - Adjusted gross income cannot be more than \$350,000 averaged over the last three years
  - Fair market value of total assets, including interest in firm and equity interest in personal residence, may not exceed \$6 million



# HOW TO OBTAIN AND MAINTAIN WOSB/EDWOSB ELIGIBILITY

- ❖ Two ways to become eligible:
  - “Modified” self certification by uploading eligibility documentation to the SBA’s online repository
  - Certification through SBA-approved Third-Party Certifiers
- ❖ Must operate in one of the industries available for the WOSB/EDWOSB Programs
  - Not all industries are available - 83 NAICS codes identified; roughly half for EDWOSB participation
  - Applicable industries identified on the SBA’s website



# A Few Notes on New Compliance Developments...





## **PRESUMED LOSS RULE**

- ❖ **Effective August 27, 2013**
- ❖ **Implements “presumption of loss” provisions of the Small Business Jobs Act of 2010**
- ❖ **Jobs Act established a presumption of loss to the Government from a size or status misrepresentation equal to the total amount expended on a contract obtained by misrepresentation**
- ❖ **Designed to prevent and deter fraud and misrepresentation in small business procurements**
- ❖ **Expected to boost prosecutions by increasing the dollar value of size/status misrepresentation cases**



## **KEY ELEMENTS OF THE PRESUMED LOSS RULE**

- ❖ **Presumption of loss**
- ❖ **Deemed certifications**
- ❖ **Signature requirement**
- ❖ **Limitation of liability**
- ❖ **Annual recertification**
- ❖ **Applicability to Subcontractors**
- ❖ **Penalties**



## **PRESUMPTION OF LOSS**

- ❖ **The new rule reads as follows:**

**In every contract, subcontract, cooperative agreement, cooperative R&D agreement, or grant that is set aside, reserved, or otherwise classified as intended for award to small, 8(a), SDB, SDVOSB, HUBZone, WOSB, or EDWOSB firms, there is a presumption of loss to the Government based on the total amount expended on the contract, subcontract, etc., whenever it is established that a firm willfully sought and received the award by misrepresentation**



## PRESUMPTION OF LOSS, CONT'D

- ❖ “Broadly inclusive” of set-asides, reserves, partial set-asides, price evaluation preferences, source selection factors, and any other mechanism not specifically addressed in the FAR
- ❖ Proposed to be an irrefutable presumption, but the final rule makes it rebuttable
  - Rebuttable presumption allows firms to demonstrate mitigating circumstances to avoid liability
  - Trier of fact (i.e., judge or jury), not the SBA, will decide if the presumption is rebutted on a case-by-case basis in civil and criminal proceedings



## **WHAT YOU SHOULD DO TO AVOID PRESUMPTION OF LOSS PENALTIES**

- ❖ Undergo an internal review
- ❖ Develop and implement corporate policy and procedures for size and status representations
- ❖ Perform risk analysis for your projects and partners
- ❖ Modify your teaming agreements and subcontracts



## LIMITATIONS ON SUBCONTRACTING

- ❖ For set-aside contracts, requires Prime Contractor to perform a certain percentage of the work with its own personnel
  - 50% for services and manufacturing contracts
  - 15% for general construction contracts
  - 25% for specialty trade construction
- ❖ SDVOSBs and HUBZone firms can satisfy requirement by subcontracting to other SDVOSB or HUBZone firms
  - 50% of all HUBZone contracts must go to HUBZone firms



## CHANGES TO LIMITATIONS ON SUBCONTRACTING

- ❖ The 2013 National Defense Authorization Act revised the limitations on subcontracting for small business participation
- ❖ Important changes:
  - For services contracts, compliance with the limitations on subcontracting will be based on the total amount paid to the small business, not the cost of the contract incurred for personnel
  - Small businesses will be able to meet their own performance requirements by subcontracting to other small companies
  - Construction contracts TBD
  - Penalties for noncompliance



## CHANGES TO LIMITATIONS ON SUBCONTRACTING, CONT'D

- ❖ The first change provides that a small business “in the case of a contract for services, may not expend on subcontractors more than 50 percent of the amount paid to the concern under the contract.”
  - This is a significant deviation from the current SBA regulation, 13 C.F.R. § 125.6(a)(1), which states that “[i]n the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.”
  - The revised rule has serious implications for small business Prime Contractors, as they will no longer be able to exclude the cost of materials, supplies, and other non-labor costs from their subcontracting limit calculations





## CHANGES TO LIMITATIONS ON SUBCONTRACTING, CONT'D

- ❖ Small business Prime Contractors may now meet their performance requirements by subcontracting to other “similarly situated” small businesses, i.e., those either small under the same standard or participating in the same small business program
  - Must be careful to make sure to count only those Subcontractors who are participating in the same programs, or who are also small for straightforward small business set-asides; the new rule does not allow for all small business Subcontractors to fall within the exception



## UNDERSTANDING THE PROPOSED ADVERSE PAST PERFORMANCE RULE

- ❖ Proposal is to amend the FAR to limit the period allowed for Contractor comments on past performance evaluations and make past performance evaluations available to source selection officials sooner
- ❖ Contractors currently have 30 days; proposal would reduce this to 14 days
- ❖ **Comments Deadline: October 7, 2013**



# Any Questions?

If you would like to speak with Jon about the eligibility requirements and compliance issues for the various set-aside programs, please contact him as follows:

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