



U.S. Small Business
Administration

Legislative & Regulatory Update

**For Small Business Government Contracting
Programs**

January 19, 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.

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](#)

Executive Action

OMB Memorandum: Advancing Equity in Procurement

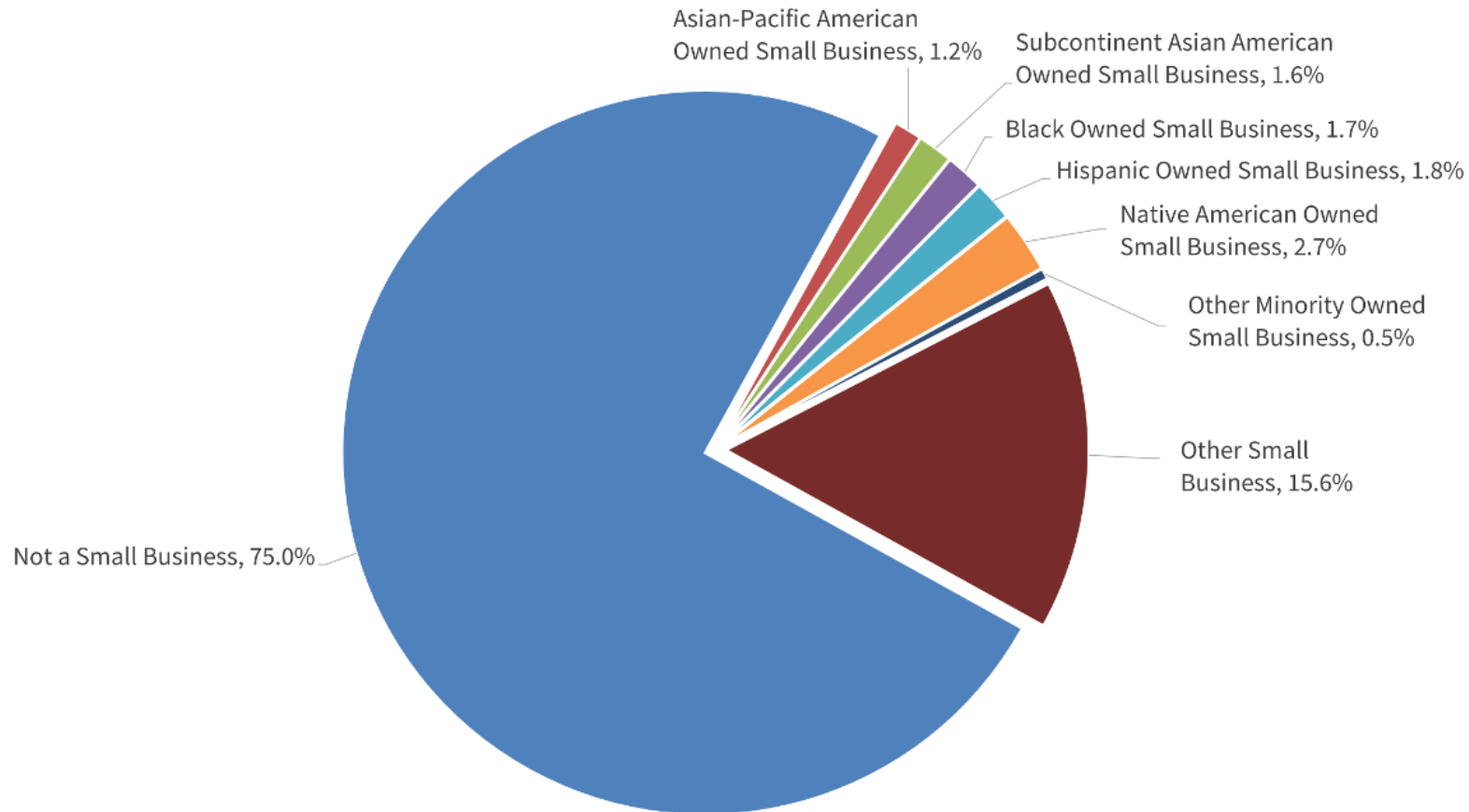
M-22-03, Dec. 2, 2021 – implementing Executive Order 13985

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 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.

Recent SBA and FAR Regulatory Action

Direct Final Rule: Definition of Surviving Spouse/Change to Sole-Source Thresholds 86 FR 61670

- 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/NHO) 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)

Direct Final Rule: HUBZone Governor-Designated Covered Areas

84 FR 62447

- Added new type of HUBZone: “Governor-Designated Covered Area”
 - Non-urbanized areas with populations of 50,000 or less
 - Unemployment of at least 120% the state or US average
 - Opportunity Zones encouraged
 - Governors must petition SBA – limited to one petition per year
- Published November 11, 2019
- Effective January 1, 2020
- Illinois expansion granted on May 18, 2021

Direct Final Rule: Extending HUBZone Map Freeze

[86 FR 23863](#)

- Extends the HUBZone Map freeze until June 30, 2023
 - Qualified census tract data using the 2020 Census results will not be available until late 2022.
 - Applies to all current Redesignated Areas and Qualified Base Closure Areas, and most current Qualified Disaster Areas.
 - The HUBZone Map has been updated to reflect the new expiration date for those areas.
 - After SBA receives the Census data from HUD, SBA will post a list identifying areas newly designated as Qualified Census Tracts, Qualified Non-metropolitan Counties, and Redesignated Areas, so that firms can plan accordingly.

HUBZone: New Qualified Non-Metropolitan Counties

[84 FR 65222](#)

- In early August, the HUBZone Map was updated to add 452 new Qualified Non-Metropolitan Counties (QNMCs).
- This update is in response to a statutory change to the definition of the term “Qualified Non-Metropolitan County” that went into effect in 2020.
- SBA conducted an analysis using the amended definition to identify additional non-metropolitan counties that would qualify as QNMCs and have added them to the HUBZone map.

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

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
 - Requests 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)

FAR Final Rule: Limitations on Subcontracting

86 FR 44233

- 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

- 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

- 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

- 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: 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

FAR Proposed Rule: WOSB Certification

[86 FR 55769](#)

- 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

Upcoming SBA proposed rules

1. NDAA 2020, Credit for Lower Tier Subcontracting and Other Amendments
2. Small Business Size Standards: Manufacturing and Industries With Employee Based Size Standards in Other Sectors Except Wholesale Trade and Retail Trade
3. HUBZone Program Updates and Clarifications

Upcoming FAR proposed rules

1. Proposed 2021-020, Limitations on Subcontracting Revisions
2. Proposed 2021-012, 8(a) program
3. Proposed 2021-011, Past Performance of First-Tier Subcontractors
4. Proposed 2021-010, Subcontracting to Puerto Rican and Other Small Businesses
5. Proposed 2021-009, Protests of Orders Set Aside for Small Business
6. Proposed 2020-016, Representation of Size and Socioeconomic Status

Upcoming FAR proposed rules (cont.)

7. Proposed 2020-010, SBIR/STTR
9. Proposed 2020-007, Accelerated Payments Applicable to Contracts with Certain Small Business Concerns
10. Proposed 2019-008, Small Business Program Amendments

Upcoming FAR final rules

1. Final 2018-020, Construction Contract Administration
2. Final 2017-019, Policy on Joint Ventures
3. Final 2016-002, Applicability of Small Business Regulations Outside the United States

Notable Legal Decisions

GAO protest on joint ventures' security clearances

[InfoPoint LLC, B-419856](#), Aug. 27, 2021

- Protest from Michigan small business that an Air Force solicitation improperly required that a joint venture competing for the award, as opposed to the members of the joint venture, have a top-secret facility clearance.
- GAO reviewed section 1629 of NDAA FY20 and SBA's 13 CFR 121.103(h)(4).
- GAO concluded that the law unambiguously prohibits DOD from requiring that a joint venture hold a facility clearance if the members of the joint venture hold the required facility clearances.
- GAO sustained the protest and recommended that the Air Force remove the solicitation requirement.



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