Small Business Federal Legislative/Regulatory Forecast
Adapting to Major Changes Coming Around the Bend

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Overview

• Section 809 Panel Recommendations
• Legislative changes
  – H.R.6330: Small Business Runway Extension Act of 2018
  – H.R. 190: Expanding Contracting Opportunities for Small Businesses Act of 2019
• Regulatory changes
  – Limitations on Subcontracting (FAR)
  – Limitations on Subcontracting (SBA)
  – HUBZone program re-write
  – WOSB certification
  – Consolidation/Cleanup of SBA’s mentor-protégé regulations
• Washington State/Local
  – I-1000
SECTION 809 PANEL PROPOSED REFORMS IMPACTING SMALL BUSINESS
Section 809 Panel Basics

• Created by Section 809 of the FY16 NDAA to review the acquisition regulations applicable to the DoD with a view toward streamlining and improving the efficiency and effectiveness of the defense acquisition process and maintaining defense technology advantage, and to proposed changes to acquisition “regulations.”

• Panel started meeting in Sept. 2016

• Published report in 3 Volumes (4 parts), between March 2018 and January 2019

• The Section 809 Panel, tasked with identifying ways to streamline and improve the defense acquisition system, has made a total of 98 recommendations, “encompassing both evolutionary and revolutionary change.”
Who is the Section 809 Panel
Section 809 Changes Roadmap

**LEVERAGE THE DYNAMIC MARKETPLACE**
- Implement the Dynamic Marketplace Framework
- Simplify Commercial Buying
- Revise DoD’s Socioeconomic Mission
- Communicate with Industry
- Clarify use of Other Transaction Agreements

**ALLOCATE RESOURCES EFFECTIVELY**
- Institute Portfolio Management
- Allocate Budgetary Resources Effectively

**ENABLE THE WORKFORCE**
- Reform Workforce Development
- Improve Use of Data for Decision Making
- Support Research & Reform

**SIMPLIFY ACQUISITION**
- Revise Processes to Value Time & Put Mission First
- Update Adjudicative Processes
- Simplify Contracting
- Simplify Acquisition of Information Technology
- Clarify Services Policies
- Improve & Focus Oversight
- Simplify Title 10

**LEVERAGE THE DYNAMIC MARKETPLACE**
- Recommendation 35
  - Simplify Commercial Buying
    - Recommendations 1, 2, 3, 4, 28, 62, 63, 80, 92
  - Revise DoD’s Socioeconomic Mission
    - Recommendations 21, 79, 64, 65
  - Communicate with Industry
    - Recommendations 84, 85, 86, 87
  - Clarify use of Other Transaction Agreements
    - Recommendation 81
Section 809 Panel – Rec. 35

• Recommendation 35:
  – Replace commercial buying and the existing simplified acquisition procedures and thresholds with simplified readily available procedures for procuring readily available products and services and readily available products and services with customization.
Section 809 Panel – Rec. 35

- **Key impacts of Rec. 35 for small businesses:**
  - elimination of small biz set-asides for vast majority of DoD supply/services procurements
  - elimination of publicized procurements for most DoD supply/services procurements
  - elimination of bid protest (and likely size protest) rights for most DoD supply/services procurements
Section 809 Panel – Rec. 35

• “Most of the readily available products and services DoD contracting officers buy every day are available from multiple easily accessed sources, with prices transparently advertised online or through catalogues. These products and their prices are available to anyone, including the nation’s near-peer competitors and nonstate actors, which also see them. These prices, along with product quality, shipping rates, warranties, and vendors’ commercial business practices are subject to continuous competition and are transparent to the public. DoD should have the authority to leverage this continuous market-based competition, which constitutes true full and open, transparent, competition.”

• “The panel’s recommendations, in part, will allow DoD to make purchases in a manner similar to the way private-sector businesses do”
Section 809 Panel – Rec. 35

Procurement Types Separated into Three Lanes

**Readily Available**
- No customization
- Rapid delivery
- Mostly products, some services
- Transparent market-based pricing, terms, and competition
- Typically multiple sources
- Limited procurement laws/policies apply
- Simplified procedures

**Readily Available with Customization**
- Customized using common, commercial processes
- Competitive solicitations may be needed
- Typically multiple sources
- Products, most DoD Services
- Pricing from quotes
- Limited procurement laws/policies apply
- Simplified procedures
- No cost contracts

**Defense-unique**
- Development financed by DoD
- DoD can dictate terms
- Competition limited or nonexistent
- Pricing based on development costs
- Products, few services
- Reduced compliance burdens and process redundancies
- New rapid acquisition authorities fully implemented with empowered users
Section 809 Panel – Rec. 35

809 Panel: “Although the category of services that meets the definition of readily available, discussed above, may be small, nearly all of the services DoD procures should meet the definition of readily available with customization. Everything from janitorial services to engineering services and even armed services, are regularly contracted for in the private sector with vendors providing customization based on specific customer needs. The mere fact of a DoD application of a service does not change the nature of the service.”

RESULT → elimination of small biz set-asides for vast majority of DoD supply/services procurements
Section 809 Panel – Rec. 35

• What supplies/services are NOT “Readily Available” or “Readily Available with Customization”?
  – “There are two circumstances under which DoD requires customization that may be DoD-unique: when services are provided in a combat zone, and in the business arrangement for which DoD acquires services under a cost reimbursable contract.
  – “[BUT] even when services are to be performed in a combat zone, which certainly adds risk and cost, the services being performed are typically logistical or base operating support services that are similar to those procured in the private sector.”
Section 809 Panel – Rec. 35

- What would set-asides be replaced with? 5% price preference
  - Proposed language:
    - (e) Evaluation of Prices for Small Businesses.— (1) A small business concern (within the meaning of section 3 of the Small Business Act (15 U.S.C. 632)) that offers a product or service that meets a requirement of the Department of Defense shall be provided a 5 percent price preference in the evaluation of offers or in comparing publicly available pricing from sources of readily available products and services.
  - Similar to HUBZone price pref.
  - Completely eliminates any preference for socio-economic categories (8a, WOSB, SDVOSB, HUBZone)
• 809 Panel’s Reasoning for Eliminating Set Asides:
  
  – “set-asides and other small business programs incent small businesses to make extraordinary efforts to remain small. Setting-aside all procurements under a certain dollar threshold does not encourage a small business to grow beyond that threshold, especially if that business relies on competing for procurements that are currently set aside for small business.”
  
  – Using a price preference and requiring DoD to continue to meet the overarching small business use goal established by SBA will ensure the same amount of DoD dollars are invested in small business, while allowing capable small businesses to grow and compete for opportunities.”
Section 809 Panel – Rec. 35

• 809 Panel’s Reasoning for Eliminating Set Asides:
  – “Small business policies, which are focused on meeting quotas through indiscriminate set-asides and reservations, are not benefiting DoD or small businesses in a way that ensures DoD has access to a robust, innovative, and globally competitive small business vendor-base”
Section 809 Panel – Rec. 35

• BUT that’s not all.... It gets worse.
  – *Price pref. won’t help much if you can’t compete for the procurement because its not open/public*
Section 809 Panel – Rec. 35

• Publicized Procurements Replaced with “Market-Based Competition” for many DoD procurement:
  – Publicly posted RFPs or requests for quote (RFQs) would only be required for Readily Available Products and Services (with or w/o customization) when the value of a procurement is expected to exceed $15 million or the period of performance for a service or requirements contract would exceed 12 months.
  – Even if a procurement is above threshold, no publicized procurement if Chief of the Contracting Office concludes that a publicly posted RFP or RFQ would not increase the competition that already exists in the marketplace and would not add value to the procurement.
Section 809 Panel – Rec. 35

• “Market-based competition” means the consideration of sources that offer readily available products, services, and solutions at prices available to any potential buyer, resulting in competition being established through market forces.
  – Direct Solicitation of sources identified through market research (i.e., a non-public RFP/RFQ) – or – No RFP/RFQ at all
  – The contracting officer must purchase from the source, identified through market research, whose offer presents the best value to the agency.
  – Notice of award, but no public notice prior to that time.
Section 809 Panel – Rec. 35

• “Market-based competition”
  – “When utilizing market-based competition, authorized individuals may directly solicit sources of readily available products and services identified through market research either orally, electronically, or in writing when necessary to ensure the agency receives the benefit of available discounts or other preferential terms and conditions not included in a vendor’s online or catalogue-based marketing.”
Section 809 Panel – Rec. 35

- GAO and COFC would have **no protest jurisdiction** over pre-award or post-award bid protests of “market-based competitions”
“Transparency and Accountability: Transparency and accountability are no less important when it comes to procuring customized readily available products and services. The reformed bid protest process recommended by the Section 809 Panel could be used to ensure transparency and accountability continue to be achieved when a publicly posted RFP or RFQ is used. In those cases, the process for procuring customized readily available products and services remains conducive to both preaward and postaward protests to identify situations in which DoD did not follow the law or federal acquisition rules. In situations when a publicly posted RFP or RFQ is not used, market research documentation, a redacted source selection decision document (SSDD), and a copy of the contract would be posted to the public-facing website where readily available procurements are posted.”
Section 809 Panel – Rec. 35

• **Summary**
  – readily available products and services and readily available products and services with customization (collectively “RAPS”) encompass the vast majority of DoD procurements -- all services and supplies DoD procures are RAPS except cost reimbursable contracts and combat zone services
    • No small business set-asides for RAPS
      – RESULT: *elimination of small biz set-asides for vast majority of DoD supply/services procurements*
  – No requirement for open/public procurements of RAPS under $15m and 12 months, instead “market-based competitions”
    • RESULT: *elimination of small biz set-asides for vast majority of DoD supply/services procurements*
  – No GAO or COFC bid protest jurisdiction over “market-based competitions”
    • RESULT: *elimination of bid protest rights for most DoD supply/services procurements*
Section 809 Panel – Rec. 35

• ABA PCL Small Business Committee opposed this recommendation when 809 Panel initially floated the idea in Spring 2018
Section 809 Panel – Rec. 75d (8a release)

• Subrec. 75d: Revise FAR 19.815 to allow for tacit release for non-8(a) competition by the SBA if concurrence or rejection has not been received by the SBA after 15 working days.

• Current Rule:
  – “once a requirement has been accepted by SBA into the 8(a) program, any **follow-on requirements** shall remain in the 8(a) program unless there is a mandatory source... or SBA agrees to release the requirement from the 8(a) program.”
  – If release request is from the procuring agency, SBA considers: has agency achieved its SDB goal and other SB/Socioeconomic goals? Is the requirement critical to the business development of the 8(a) Participant that is currently performing it.
  – FAR 19.815; 13 CFR 124.504(d)

• The Problem (according to 809 Panel)
  – There is no prescribed timeframe when a request is made to release a requirement from the 8(a) program.
  – This prevents contracting officers from soliciting performance outside the 8(a) program and causes unnecessary delays while waiting for the SBA’s response.
  – Evidence: a single complaint email to the panel?

• Proposed Solution
  – Release from 8(a) program is presumed if SBA does not respond to a release request with a determination within 15 working days after receipt of the contracting officer’s written request
Section 809 Panel – Rec. 80

- Problem (according to the 809 Panel)
  - When the government’s needs may be met by commercial products or services and contracting officers are considering a small business set-aside, they may face a dilemma if the small-business solution does not satisfy the definition of commercial product or commercial service.
  - Neither statute nor regulation provides an order of precedence between the statute’s preference for acquiring commercial products or services and the requirement to procure certain products or services from small businesses.
  - Clarification is needed regarding existing law following the COFC’s determination in *Analytical Graphics, Inc. v. United States* that “there is not a clear order of precedence” between the commercial item preference and the Rule of Two

- Solution
  - Revising statutory guidance to clarify that the acquisition of commercial products and services has precedence over small-business set-asides.
  - Contracting Officers would first be required to determine whether a commercial item is available to meet their needs, and if they determined there was then apply rule-of-two to determine whether that commercial item procurement should be set-aside for small business
Section 809 Panel – Recs. 66-69 (bid protests)

• Rec. 66: Establish a purpose statement for bid protests in the procurement system to help guide adjudicative bodies in resolving protests consistent with said purpose and establish a standard by which the effectiveness of protests may be measured.

• Rec. 67: Reduce potential bid protest processing time by eliminating the opportunity to file a protest with the COFC after filing at the GAO and require the COFC to issue a decision within 100 days of ordering a procurement be delayed.

• Rec. 68: Limit the jurisdiction of GAO and COFC to only those protests of procurements with a value that exceeds, or are expected to exceed, $75,000.

• Rec. 69: Provide as part of a debriefing, in all procurements where a debriefing is required, a redacted source selection decision document and the technical evaluation of the vendor receiving the debriefing
Section 809 Panel – Rec. 67 (bid protests)

• Currently:
  – If you lose at GAO, you can file a second-bite protest at COFC
  – Protests at GAO must be decided within 100 days of filing; no corresponding time limit for COFC, but the majority of protests are resolved within 100 days at COFC (Note: Timeline at COFC is largely dictated by the Agency)

• The Problem:
  – Allowing protestors to litigate a protest at GAO and, if not satisfied with the GAO decision, file the same or a refined version of the protest at COFC undermines one of the critical aspects of GAO’s jurisdictional mandate: “providing for the inexpensive and expeditious resolution of protests.”
  – The two-bite process is not expeditious, is costly to all parties involved, and in each of the cases presented in the DoD proposal provided no added value to the system by way of additional accountability.
Section 809 Panel – Rec. 67 (bid protests)

• The Solution
  – Proposed Changes
    • Apply GAO protest timeliness rules to COFC protests
    • Remove COFC jurisdiction over protests where that protester “had previously filed a bid protest with the Comptroller General based on substantially the same objection to a solicitation, proposed award, or award of a contract or alleged violation of statute or regulation.”
    • COFC must render judgement on a bid protest “within 100 days of the Court ordering, or the parties agreeing, that performance of the contract that is the subject of the action be suspended or that award of the contract that is the subject of the action be suspended.”
    – Applying timeliness rules to COFC for filing of DoD postaward protests that mirror those that apply to GAO and codifying the preaward timeliness rules currently based on case law, would require protestors to file protests at COFC in a timelier manner and ensure that GAO remains available as an expeditious means of resolving protests.
    – Applying GAO’s protest resolution timeliness rules to the Court for rendering judgement on a procurement related action, will ensure the Court meets its mandate for expeditious resolution, but only when the Court has ordered a procurement be stayed pending resolution of the action.
Section 809 Panel – Rec. 67 (bid protests)

• What is missing
  – Giving teeth to GAO recommendations, and rights to appeal to CAFC
  – Providing same protest discovery rights at GAO as at COFC
  – Applying CICA stay rules to COFC protests
  – Adding more COFC judges

• Why this doesn’t make sense
  – COFC and GAO do not always agree
  – The record before COFC is often much larger than at GAO
  – COFC protests only result in procurement delays where (1) the protester is able to demonstrate at a very early stage that it has a high likelihood of success; or (2) the agency voluntarily stays the procurement/award pending resolution of the protest
Section 809

- [https://section809panel.org/](https://section809panel.org/)
- [https://section809panel.org/media/updates/](https://section809panel.org/media/updates/) (Reports)
LEGISLATION PROPOSED TO IMPACT SMALL BUSINESS CONTRACTING & SUBCONTRACTING
Small Business Runway Extension Act of 2018

- H.R.6330 – Signed by President 12/17/2018  

- Amends the Small Business Act to revise calculation period for small business size standards that are calculated using average annual gross receipts (as opposed to employee count) of a business changes from previous 3 years to previous 5 years

- **BUT…. SBA (who opposed this change) immediately published a notice stating that Runway Extension Act was not immediately effective**
Small Business Runway Extension Act of 2018

- **SBA Info. Notice 6000-180022** (Dec. 21, 2018):
  - SBA is receiving inquiries about whether the Runway Extension Act is effective immediately—that is, whether businesses can report their size today based on annual average receipts over five years instead of annual average receipts over three years. The Small Business Act still requires that new size standards be approved by the Administrator through a rulemaking process. The Runway Extension Act does not include an effective date, and the amended section 3(a)(2)(C)(ii)(II) does not make a five-year average effective immediately. The change made by the Runway Extension Act is not presently effective and is therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process. The Office of Government Contracting and Business Development (GCBD) is drafting revisions to SBA’s regulations and SBA’s forms to implement the Runway Extension Act. Until SBA changes its regulations, businesses still must report their receipts based on a three-year average.
Small Business Runway Extension Act of 2018

• March 26, 2019 – Congress holds hearings on implementation of the Act, disagrees with SBA’s position
  – https://www.youtube.com/watch?v=UgYuuEiMk7M

• April 11, 2019 – SBA Issues “Whitepaper” re-stating its position, says implementing regulations on their way
  – “This change to the calculation of annual average receipts requires the issuance of a proposed rule and approval by the SBA Administrator. Accordingly, SBA will be initiating a rulemaking to implement the new law into SBA’s regulations. Businesses must continue to report their annual receipts based on a 3-year average until SBA amends its regulations.”

• April 18, 2019 – Congress introduces new bill “Clarifying the Small Business Runway Extension Act” – passed by House committee, pending before the House
  – As amended, the Clarifying act states that the Original Act took effect immediately upon signing into law (Dec. 17, 2018). Also states SBA must issue corresponding regulations by December 2019.
  – https://smallbusiness.house.gov/uploadedfiles/05-01-19_hr_2345_hagedorn_amendment_1v2.pdf
  – https://www.congress.gov/bill/116th-congress/house-bill/2345?q=%7B%22search%22%3A%5B%223A%5B%222345%22%5D%7D&r=1&s=4
  – https://www.youtube.com/watch?v=nCSLHWWrDfg (at 56:40)
Small Business Runway Extension Act of 2018

• So who is correct? SBA or Congress?
• Can you certify based on 5-year standard right away? Or do you need to wait for SBA implementing regulations?
Expanding Contracting Opportunities for Small Businesses Act

- H.R. 6369 (115th Cong.): Expanding Contracting Opportunities for Small Businesses Act of 2018 - passed House, died in Senate
- Reintroduced as H.R. 190 (Expanding Contracting Opportunities for Small Businesses Act of 2019), and has passed the House
Expanding Contracting Opportunities for Small Businesses Act

- Raises the dollar amount of certain small business sole-source contract awards in statute for inflation and removes the limitation of option years from the maximum dollar values permitted to be awarded through sole-source contracts to WOSB and SDVOSB concerns: $7M manufacturing / $4M all other contracts

- To mitigate the risk of fraud and abuse, the bill strengthens oversight by instituting an eligibility determination check requiring SBA to verify that a sole-source contract intended to be awarded to a WOSB or SDVOSB is an eligible WOSB or SDVOSB.
  - “the contracting officer has notified the [SBA] Administration of the intent to make such award and requested that the Administration determine the concern’s eligibility for award; and the Administration has determined that such concern is eligible for award.”

- The bill also requires the Government Accountability Office to assess whether federal sole-source award data is accurate and identify awards made to ineligible entities.
Incentivizing Fairness in Subcontracting Act

• Background:
  – Dec. 2013 – Section 1614 of FY14 NDAA allows prime contractors to count lower-tier small business contractors towards the prime contractor’s small business subcontracting goals (once SBA issues implementing regulations)
  – Jan. 2017 – SBA issues final regulations to implement Section 1614 of FY14 NDAA, but with strings attached:
    • Prime contractors, not federal agencies, establishing two sets of small business subcontracting goals:
      – (1) one goal for the first subcontracting tier; and
      – (2) another for lower tier subcontracts.
      – Ultimately, however, federal agencies will evaluate the prime contractor’s small business subcontracting goal performance based on its combined performance under the first and lower tier goal;
    • Prime contractors and their large business subcontractors must assign a NAICS Code and corresponding size standard that best describes the principal purpose of the subcontract to each small business subcontract;
    • Prime contractors and large business subcontractors are responsible for making a good faith effort to meet or exceed the small business subcontracting goals established in their respective subcontracting plans. Failure to make this effort could result in liquidated damages, default termination and negative performance reviews; and
    • Prime contractors are ultimately responsible for approving and policing their large business subcontractors’ subcontracting plans.
  – Contractors (especially construction) complained about problems with the SBA implementing regulation – separate goals; sometimes hard to track lower-tiers
Incentivizing Fairness in Subcontracting Act

  - Subcontracting Goals
    - Would clarify that prime contractor has option to choose whether to receive credit for small business subcontracting at first-tier or any tier
    - Clarify there is only one subcontracting goal, and that this goal will not be broken down into lower-tier sub-goals.
    - Conditions right of large prime contractors to take credit for subcontracting to small businesses at lower tiers on prime contractors keeping records substantiating subcontracting credit claimed at lower-tiers.
  - Would also create a new dispute process for small subcontractors to bring nonpayment issues to the agency’s small business advocate (Offices of Small and Disadvantaged Business Utilization).
UPCOMING REGULATORY CHANGES IMPACTING SMALL BUSINESS CONTRACTING AND SUBCONTRACTING
FAR Clause – Limitations on Subcontracting

• Background:
  – Jan. 2013: FY13 NDAA signed into law – Sec. 1651 covers limitations on subcontracting
    • Changes LOS calc structure
    • Before: must self-perform at least 50% of labor costs (service contracts) or must self-perform at least 50% cost of manufacturing the supplies (supply contracts)
    • After:
      – may not spend more than 50% of total “amount paid by the government” on subcontractors
    • Adds “similarly situated entity” exception
    • Accounts for mixed contracts
      – excludes materials costs from services calc, and services costs from supply calc
  – 2016 – SBA revises its LOS regulation (13 CFR 125.6) to implement Sec. 1651 provisions of the FY13 NDAA
    • Adopts Sec. 1651 changes
    • Adds new rules for construction contracts
      – Before: concern will perform at least 15%/25% percent of the cost of the contract, not including the cost of materials, with its own employees
      – After: prime will not pay more than 85%/75% of the amount paid by the government to it to firms that are not similarly situated.
        » Second-tier subcontractors must independently be similarly situated to be included in exception
        » Cost of materials are excluded and not considered to be subcontracted.
FAR Clause – Limitations on Subcontracting

• BUT, FAR LOS clause (FAR 52.219-14) was not updated – FAR LOS clause still uses old LOS standard and is still included in most small business set-aside contracts
  – No similar situated exception
  – Counts compliance based on different pool of dollars
• Problem – FAR clause and SBA reg. both apply, but create two different compliance standards
• Solution on the way
  – FAR Council proposes revision to FAR LOS clause Dec. 2018
  – Final rule should come out later this year
  – Proposed rule *mostly* aligns with SBA reg
FAR Clause – Limitations on Subcontracting

• Problems with proposed rule -- Doesn’t address mixed contracts like 13 CFR 126.6(b)
  – Example contract that is 80% services, 20% supply:
    • SBA reg says cost of material are excluded from LOS calc.
    • Proposed FAR Clause would still count cost of materials in LOS calculation

• Will this problem be fixed in final rule? If not, compliance with LOS will become even more difficult than it currently is under conflicting standards
SBA Regs re Small Biz Subcontracting & LOS

- SBA issued proposed regulations related to the limitations on subcontracting (“LOS”) and small-business subcontracting
- Proposed Rule implements several provisions of the FY16 & FY17 NDAAAs
- Key changes in Proposed Rule:
  - Change to Ostensible Subcontractor Rule: would apply to both size and status (currently only applies to size)
  - Increase focus on prime contractors’ failures to make good faith attempts to comply with small business subcontracting plans
  - Clarify the requirements for size and status recertification
  - Establish that failure to provide timely subcontracting reports may constitute a material breach of the contract
  - Enhanced provisions for monitoring compliance with LOS requirements
    - SBA is proposing language to clarify that contracting officers have the discretion to request information from contractors to demonstrate compliance with LOS clauses
    - SBA proposed to require information demonstrating compliance with the applicable LOS from all prime contractors performing set-aside and sole-source contracts awarded through SBA’s small business programs when the prime contractor intends to rely on similarly situated subcontractors to comply with the LOS
  - Exclusion of certain types of costs from calculation of compliance with LOS clause
HUBZone Program Rewrite

- [Proposed rule](#) issued Oct. 31, 2018
- Final rule later this year.
- First comprehensive revision to the HUBZone rules since the program’s implementation nearly 20 years ago, and the changes are intended to improve the predictability and stability of the program for participants.
- SBA’s proposed rule changes would make it significantly easier for contractors to maintain their HUBZone status once certified.
- Among the most significant changes are:
  - An individual will continue to be treated as a HUBZone resident if that individual worked for the firm and resided in a HUBZone at the time the concern was certified or recertified as a HUBZone small business concern and he or she continues to work for that same firm, even if the area where the individual lives no longer qualifies as a HUBZone or the individual has moved to a nonHUBZone area.
  - Certified HUBZone firms would only be required to do annual recertification, rather than immediate recertification at the time of every offer for a HUBZone contract award. A HUBZone small business concern would then represent that it is a certified HUBZone small business concern at the time of each offer, but its eligibility would relate back to the date of its certification or recertification, not to the date of the offer. This would allow certified HUBZone small businesses to remain eligible for future HUBZone contracts for an entire year, without requiring it to demonstrate that it continues to meet all HUBZone eligibility requirements at the time it submits an offer for each additional contract.
WOSB 3rd Party Certification Requirements

• **Background:** Section 825 of FY15 NDAA included language requiring that WOSB and EDWOSB concerns are certified by a Federal agency, a State government, the Administrator, or national certifying entity approved by the Administrator as a small business concern owned and controlled by women.

• **New Rulemaking Required:** Establish standards and procedures for participation in this certification program.

• **What Will Change:** Revisions to the procedures for continuing eligibility, program examinations, protests, and appeals for ED/WOSB program.

• **Benefit of Changes (according to SBA):**
  – Increased confidence of contracting officers that the WOSBs being award contracts are really WOSB eligible firms.
  – Burden of eligibility compliance confirmation shifts from KO to SBA
  – Will encourage more KOs to set-aside opportunities for WOSBs

• **SBA Notes:** The proposed revisions will reflect public comments (122 comments received) that SBA received in response to the ANPRM that the agency issued in December 2016 to solicit feedback on implementation of the program. Finally, SBA is planning to continue to utilize new technology to improve its efficiency and decrease small business burdens, and therefore, the new certification procedures will be based on an electronic application and certification process.

• **RIN: 3245-AG75**

• **UPDATE – On May 14, 2019 SBA issued the proposed regulation**
The state is not prohibited from implementing “affirmative action” laws, regulations, policies, or procedures provided that they do not utilize quotas and do not constitute “preferential treatment.”

- "Affirmative action" means a policy in which an individual's race, sex, ethnicity, national origin, age, the presence of any sensory, mental, or physical disability, and honorably discharged veteran or military status are factors considered in the selection of qualified women, honorably discharged military veterans, persons in protected age categories, persons with disabilities, and minorities for opportunities in public education, public employment, and public contracting. Affirmative action includes, but shall not be limited to, recruitment, hiring, training, promotion, outreach, setting and achieving goals and timetables, and other measures designed to increase Washington’s diversity in public education, public employment, and public contracting.

- “Preferential treatment” means the act of using race, sex, color, ethnicity, national origin, age, sexual orientation, the presence of any sensory, mental, or physical disability, and honorably discharged veteran or military status as the sole qualifying factor to select a lesser qualified candidate over a more qualified candidate for a public education, public employment, or public contracting opportunity.

- "State" includes, but is not necessarily limited to, the state itself, any city, county, public college or university, community college, school district, special district, or other political subdivision or governmental instrumentality of or within the state.

Vague? Ambiguous?

What is allowed?

- Small business set-aside?
- WOSB/8a/SDVOSB/VOSB/WMBE/ACBDE set-aside?
- HUBZone set-aside?
- Cascading set-aside?
- Source selection criteria giving more points or higher ratings to bidders/offerors qualifying as a WOSB/8a/SDVOSB/VOSB/WMBE/ACBDE?
• Major problems
  – Oversight / checks
  – “individual’s”
  – Application to public works contracting – “lesser qualified candidate over a more qualified candidate”
  – The exemption for actions required to establish or maintain federal program eligibility is modified to require the Office of Financial Management to determine that ineligibility will result in a “material” loss of federal funds to the state.
  • Could this be a problem for local agencies that are direct FAA/USDOT grantees?
Consolidation of Mentor Protégé Programs

• **Background:** SBA proposes to consolidate the All Small Mentor Protégé Program and the 8(a) Business Development Mentor Protégé Program into one program. This rule will also make other revisions in the Government Contracting programs, including the process for approving management changes in entity owned concerns. It is SBA's intent to implement changes that will make it easier for small business concerns to understand and comply with the programs' requirements.

• **Predicted Changes:**
  – Elimination of 8(a) Mentor-Protégé Program
  – Changes/clarifications to joint venture agreement requirements
  – Elimination of requirement for pre-approval of JVAs for 8(a) set-asides
  – Changes to duration of MP agreements
  – Clarifications on number of protégé’s a mentor (or its affiliates) can have at any one time
  – Revisions to SBA's process for approving management changes in entity-owned 8(a) firms.

• **RIN:** 3245-AG94
Questions?

Pursuing, securing and maintaining a government contract requires navigating a host of complex legal issues.

Widely regarded as one of the premier government contracts practice groups on the West Coast, the Oles Morrison Government Contracts team is known for its ability to advise clients at all stages in the government contracting process while keeping business objectives in focus and controlling costs. We work with government contractors large and small, nationwide, and across a wide variety of industries, including: construction, base operations, maintenance, defense, maritime, engineering, health care, aerospace, information technology, energy and communications. Our team of experienced and nationally recognized government contracts attorneys work collaboratively, combining their diverse legal experiences to provide wrap-around services to our clients. We have the knowledge to guide clients of all sizes seamlessly through every step of the government contracting process at the federal, state and local levels.