

# LEGAL UPDATES



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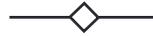
April 2024

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Member



This presentation is not intended to be legal advice. If you have specific questions, please contact a government contracts attorney.

Legal updates for government contractors.



# GovConBrief

# Overview

- 8(a) Program Upheaval
- HUBZone Program Enforcement Updates
- Joint Venture Compliance & Protests
- Buy American Act domestic content thresholds
- Proposed Greenhouse Gases reporting requirement
- As if that wasn't exciting enough—More!

## 8(A) PROGRAM CHAOS



# What's going on with the 8(a) Program?

- **8(a) Program Basics**
  - Designed to help ameliorate past instances of societal discrimination
  - Eligibility: small businesses that are owned and controlled by person(s) who are *socially and economically disadvantaged*
- **Social disadvantage**
  - Rebuttable presumption: individuals belonging to certain racial/ethnic groups
    - Historically the backbone of the program
  - Preponderance of the evidence: some other characteristic has led to discrimination



The Social  
Disadvantage  
Presumption pre-  
*Ultima*

Had been the backbone of the 8(a) program

13 C.F.R. § 124.103(b)(1) provides that the following individuals are presumed disadvantaged:

- Black Americans
- Hispanic Americans
- Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe)
- Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru)
- Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal)

## Legal Backdrop – Equal Protection



### Constitution:

- 5<sup>th</sup> Amendment: no person may be deprived of life, liberty, or property without *due process* of law
- 14<sup>th</sup> Amendment: prohibits denial of *equal protection* of the law

### U.S. Supreme Court:

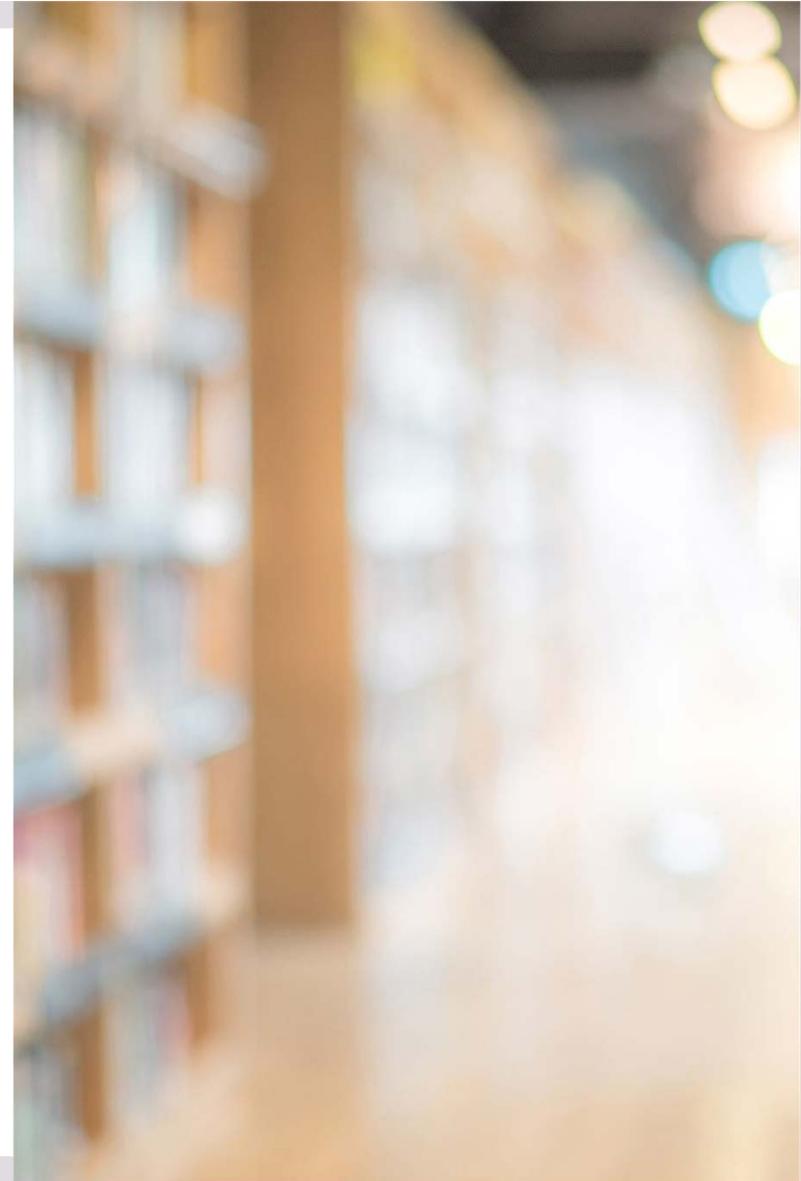
- Racial classifications are subject to strict scrutiny
  - Narrowly tailored to achieve a compelling governmental interest
  - Least restrictive means to achieve interest

*Students for Fair Admissions, Inc. v.  
President and Fellows of Harvard Coll.*

2023 Supreme Court affirmative action decision  
6-2 decision sort of – Justice Jackson recused herself  
from the Harvard part

Students must be admitted based on their  
experiences as an individual – not on the basis of  
race

Racially conscious government programs must have  
a “logical end point”



*Ultima Services  
Corp. v. Dept. of  
Agriculture*



Ultima not entitled to rebuttable presumption of 8(a) eligibility

- Contract reissued through 8(a) Program, for which Ultima did not qualify
- Ultima sued, saying that the use of the rebuttable presumption was unconstitutional

Judge (Eastern District of Tennessee) agreed

- Strict scrutiny: government did not show rebuttable presumption was narrowly tailored to meet a compelling interest
- Rebuttable presumption assumed all persons in that group were disadvantaged

SBA enjoined from using the rebuttable presumption to establish 8(a) eligibility

# Aftermath

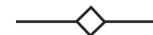
- ***Current 8(a) Participants***
  - Those who gained admission through the rebuttable presumption must submit narrative demonstrating social disadvantage by preponderance of the evidence
  - Disadvantage must adversely affect person's entry/advancement in business
- ***Future 8(a) Participants***
  - Must demonstrate eligibility through preponderance of the evidence



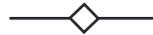


## What About Awards?

- Injunction does not prohibit exercise of options or in-scope modifications if contract issued before July 19, 2023
- SBA will verify disadvantage for:
  - 8(a) sole source awards
  - 8(a) task orders issued under non-8(a) MAC/IDIQ
  - Call orders placed against BPAs or BOAs
- Competitive 8(a): SBA will verify disadvantage if asked by agency



## *Demonstrating disadvantage*



Present evidence of a distinguishing feature (example: race or ethnic origin)

Explain specific experiences of disadvantage

Disadvantage must be:

- Chronic
- Substantial
- Occurred in American society

Must have negatively impacted the person's entry into or advancement in business

- Remember that this is a business development program

Evidentiary standard: Preponderance

*DBE Program  
Challenged*

*Mid-America Milling Co., LLC v.  
Department of Transportation*

Filed in Eastern District of Kentucky

Argued DBE program violates equal  
protection

Asks the court to rule entire program  
unconstitutional

Dry run for 8(a)?

DOT has moved to dismiss



# Minority Business Development Agency Challenged

MBDA provides capital access and contracting support to “socially and economically disadvantaged individuals”

By statute, certain groups are presumed to qualify for assistance:

- Blacks or African Americans
- Hispanics or Latinos
- American Indians or Alaska Natives
- Asians
- Native Hawaiians or other Pacific Islanders

In practice, applicants need to qualify for one of the groups to receive assistance

# *Nuziard, et al. v. Minority Business Development Agency*



- Plaintiffs who did not fit one of the presumed categories for MBDA challenged constitutionality of the program
- Court applied strict scrutiny and reviewed the purpose and tailoring of MBDA
- Concluded the program's racial and ethnic qualification categories were not constitutional
- Enjoined the application of presumed racial and ethnic categories to qualify for assistance



# Take Home



- The Supreme Court opened the door for successful constitutional challenges of federal contracting and economic assistance programs
- More challenges are likely to come.
  - Minority and gender-based programs are particularly susceptible to challenge
- Programs will need to adapt to comply with new constitutional landscape



HUBZONE PROGRAM  
ENFORCEMENT UPDATES



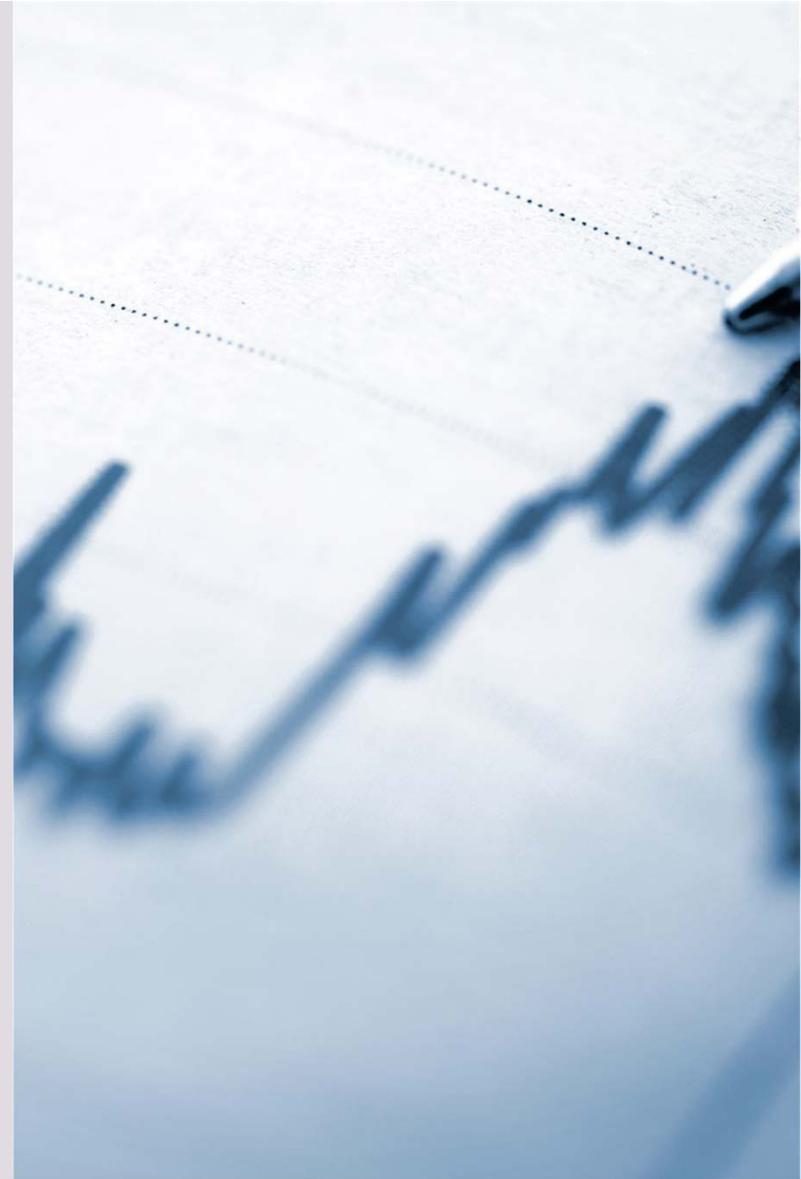
# The HUBZone Program



“The purpose of the HUBZone program is to provide federal contracting assistance for qualified SBCs located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas.”

## HUBZone program foundational requirements

1. A principal office located within a designated HUBZone; and
2. A minimum of 35 percent of the employees reside in a HUBZone.



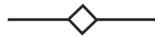
# HUBZone Employees



- An employee is defined as:  
“[A]ll individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours during the four-week period immediately prior to the relevant date of review[.]”
- The SBA reviews payroll records covering the four-week period prior to the application or recertification date.
- Whether an individual qualifies as an employee depends on the totality of the circumstances.



# Official SBA Position



“Placing HUBZone residents on the payroll is not the equivalent of putting them to work. . . . [A]s defined by the HUBZone regulations, and in accordance with the intent of the program to increase employment opportunities, an employee is someone who works.”

## Updated Expectations

- HUBZone participants and applicants must now be prepared to supply job descriptions for those employees working 30 hours or less per-week.
- The SBA may also request the following documents to verify the job description work is being performed:
  - Resumes
  - Detailed timesheets
  - Progress reports submitted by the employee
  - Meeting or training attendance substantiation
  - Regular communication with management (such as emails, meeting notes, etc.)
  - Tangible work product produced by each individual
  - A written explanation as to why any of these items cannot be provided for any of the individuals.

## Take Home



- The SBA is reviewing employees with greater scrutiny
- HUBZone participants need to prepare additional supporting documentation for parttime employees
- Regulatory changes are likely in the works



JOINT VENTURE  
COMPLIANCE



## Small Business Joint Ventures

- Separate legal entity of limited purpose and duration between two or more small businesses, or a mentor and its protégé.
- Must prepare written joint venture agreement containing the 12 “magic” items specified by regulation.
  - Purpose
  - Management
  - Ownership
  - Profit Allocations
  - Special Bank Account
  - Equipment, Facilities, & Other Resources
  - Negotiation, Labor, & Performance Responsibilities
  - Continued Performance Obligation
  - Record Preparation
  - Record Retention
  - Quarterly Financial Statements
  - Project End Profit & Loss

# Bidding with Joint Ventures



Joint Venture regulations expect participants to have a procurement in mind *before* drafting.



A Joint Venture may submit bids on multiple projects, but *each* project must independently satisfy the applicable joint venture regulation requirements.

\*Be mindful of the 2-year ordering period\*



Joint Ventures are frequently amended with project specific addenda to fill in gaps for specific projects.

## Costly Errors

- *Beshenich Muir & Associates, LLC et al.*, SBA No.VSBC-292-P (July 19, 2023)
  - OHA found Joint Venture did not qualify as SDVOSB because the agreement did not identify a Responsible Manager, and did not provide sufficient detail regarding equipment, facilities, and other recourses, or adequately specify negotiation, source of labor, or performance responsibilities.
- *New Directions Technologies, Inc.*, SBA No.VSBC-299-P (Aug. 9, 2023).
  - OHA concluded SDVOSB Joint Venture was non-compliant because day to day operational control was not vested unconditionally in the managing venturer.
- *Focus Revision Partners*, SBA No. SIZ-6188 (Jan. 31, 2023).
  - Mentor-protégé Joint Venture was ineligible for award because the addendum for the project was unsigned and submitted to the government after the deadline for proposal submission.

## Take Home

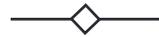
- Size and status protests of joint ventures are increasing in frequency and finding success.
- Joint Venture Agreements are not mere “paper” for a file.
  - The SBA will review the substance of a Joint Venture Agreement during a protest
- Joint Venture Agreements need to be compliant *before* proposal submission.
  - All 12 “magic” requirements must be present with sufficient detail for *each* contract.
  - If using an addendum, it needs to be executed before proposal submission and list all required information.

BUY AMERICAN ACT DOMESTIC  
CONTENT THRESHOLDS



# Buy American Act

## Domestic Content Thresholds



- Two-part test for non-steel/iron *domestic end products*
  - Manufactured in the U.S.
  - 60% of costs of components are mined, produced, or manufactured in the United States **OR** the end product is a commercially available off the shelf (COTS) item
- Same test applies for domestic construction materials



# Buy American Act Domestic Content Thresholds

- ***Effective October 25, 2022***
  - The cost of the components mined, produced, or manufactured in the United States exceeds 60% of the cost of all components.
  - Delay to allow contractors and supply chains to adjust
- ***Calendar years 2024-2028***
  - Threshold rises to 65%
- ***Calendar year 2029 and after***
  - Threshold rises to 75%
- ***Contracts spanning multiple years?***
  - Must comply with each increased threshold for the items in the year of delivery
  - Exception: a senior procurement official of the procuring agency, after consulting with the OMB and Made in America Office, can allow for an alternative domestic content test that applies for the entire contract

# Buy American Act Domestic Content Thresholds



- Fallback provision
  - If an agency doesn't receive offers with domestic end products at the new thresholds, it can treat a foreign end product that is manufactured in the U.S. and exceeds 55% domestic content as a domestic end product.
- Fallback provision sunsets on January 1, 2030

PROPOSED GREENHOUSE GASES  
REPORTING REQUIREMENT



# Proposed Rule for Disclosing Greenhouse Gas Emissions



- Executive Order 14030: directs the FAR Council to amend the FAR to require certain federal contractors to publicly disclose GHG emissions and set science-based reduction targets
- FAR 52.223-22 & FAR 52.212-3(t): requires contractors receiving \$7.5 million in federal contract award in the prior fiscal year to represent whether they publicly disclose GHG emissions and a reduction goal



# Proposed Rule for Disclosing Greenhouse Gas Emissions

- Proposed rule creates two categories of Federal suppliers
  - **Significant:** supplier that received \$7.5 million to \$50 million in federal contract obligations in previous fiscal year
  - **Major:** supplier that received more than \$50 million in federal contract obligation in previous fiscal year
- CO would treat significant and major contractors as nonresponsible unless the firm:
  - Inventories its total GHG emission and discloses GHG emission in SAM
  - Makes available on a public website an annual climate disclosure using the CDP Climate Change Questionnaire and sets targets to reduce emissions

# Proposed Rule for Disclosing Greenhouse Gas Emissions



- GHG emissions inventory would cover two scopes
  - Scope 1: direct GHG emissions from sources owned or controlled by the reporting entity
  - Scope 2: indirect GHG emissions associated with electricity generation, heating and cooling, and steam when purchased from the reporting entity's own consumption
- Climate disclosure not applicable to business who are small under their primary NAICS code identified in SAM

# PROJECT LABOR AGREEMENT



# Project Labor Agreement



- Project Labor Agreement (“PLA”) is a pre-hire collective bargaining agreement that is unique to the construction industry.
  - Negotiated between one or more construction unions and one or more construction employers
  - Establish terms and conditions of employment for a specific construction project
- FAR 52.222-33 & 52.222-34 require a PLA for every “Large-Scale Construction Project”
  - Any construction project or task order that exceeds \$35 million
  - Flows-down to subcontractors



# Project Labor Agreement

The PLA must accomplish the following:

- (1) Bind the contractor and subcontractors performing the construction project to comply with the PLA;
- (2) Allow the contractor and all subcontractors to compete for contracts and subcontracts without regard to whether they are otherwise parties to collective bargaining agreements;
- (3) Contain guarantees against strikes, lockouts, and similar job disruptions;
- (4) Set forth effective, prompt, and mutually binding procedures for resolving labor disputes;
- (5) Provide for labor-management cooperation on productivity, quality of work, safety, and health; and
- (6) Fully comply with all laws and regulations.

# Project Labor Agreement



- Final Rule became effective December 22, 2023
- Florida First Coast chapter of Associated Builders and Contractors has sued to enjoin enforcement



MORE UPDATES!



# Federal Contractor Minimum Wage

- Began on January 30, 2022 for new contracts (\$15.00)
  - 2023: \$16.20/hour
  - 2024: \$17.20/hour
- Applies to subcontractors
- Doesn't change higher wages dictated by other statutes
- DOL can raise each year
- Federal Court in Texas has enjoined in Texas, Louisiana, Mississippi; other courts (Colorado and Arizona) have found lawful



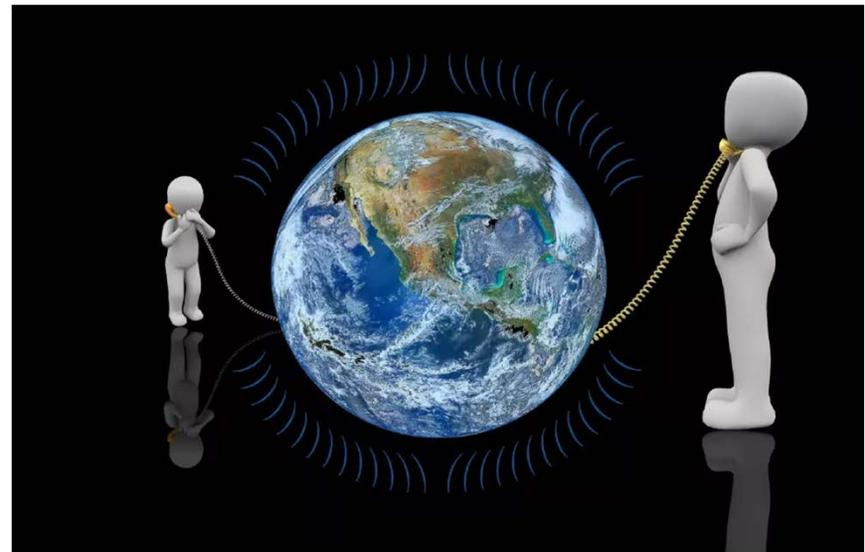
## Size Standards: Calculating Employee Count



- 12-month averaging period changed to 24-month period
  - Businesses in existence for more than 24 months
    - Average number of employees for each pay period for the preceding 24 completed months
    - Firm with 24 annual pay periods: add up employees in each pay period and divide by 48
  - Businesses in existence for less than 24 months
    - Average number of employees for each pay period during existence
- No change to who SBA counts as an employee
- Must include, as before, employees of all affiliates

# Government and Industry Communications

- FAR 1.102-2(a)(4)
- The Government must not hesitate to communicate with industry as early as possible in the acquisition cycle to help the Government determine the capabilities available in the marketplace. Government acquisition personnel are permitted and encouraged to engage in responsible and constructive exchanges with industry (e.g., see [10.002](#) and [15.201](#)), so long as those exchanges are consistent with existing laws and regulations, and do not promote an unfair competitive advantage to particular firms.



# Government and Industry Communications

- FAR also explicitly allows “one-on-one meeting with potential offerors.”
- Communications can’t give one firm an advantage over others
- Myth-Busting memos
  - Myth-Busting: Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process (February 2, 2011)
  - Myth-Busting: Addressing Misconceptions and Further Improving Communication During the Acquisition Process (May 7, 2012)
  - Myth-Busting 3: Further Improving Industry Communication with Effective Debriefings (January 5, 2017)
  - Myth-Busting 4: Strengthening Engagement with Industry Partners through Innovative Business Practices (April 30, 2019)

White House:  
Promote SB  
MAC  
participation

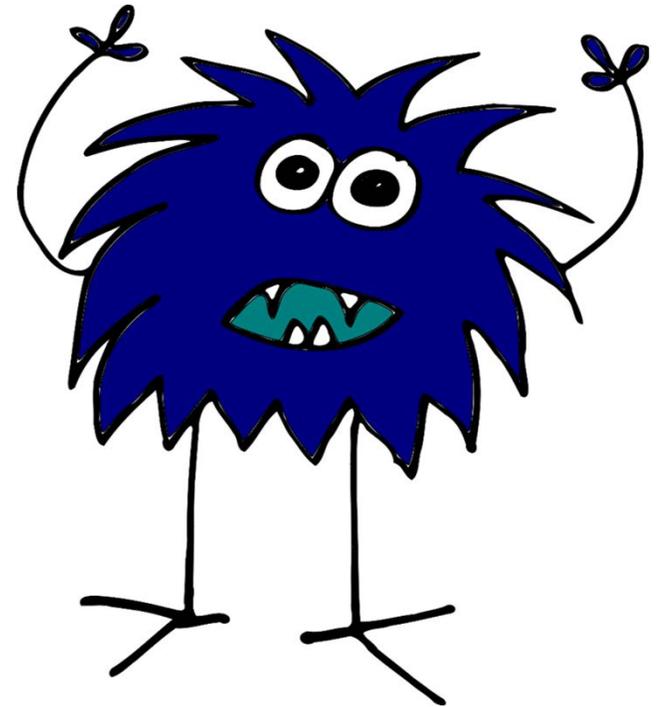
- OMB guidance:
  - Engage agency small business specialists earlier in the contract planning process;
  - Consider greater “on-ramp” opportunities for small businesses; Discourage agencies from using “off ramps” to remove small businesses from MACs due to growth;
  - Apply the “Rule of Two” to reserve opportunities for small businesses where possible; and
  - Maximize the issuance of small orders to small businesses.



# CMMC



- DoD proposed rule
- Contractors currently have to comply with NIST SP 800-171 Rev 2
- This rule is basically CMMC 2.0
- Three levels – foundational, advanced, expert
- Will apply to all DoD procurements above micro purchase except:
  - COTS items;
  - Government information systems operated by contractors;
  - DoD discretion to waive in “very limited circumstances.”
- Will flow-down to subs
- Comments due Feb. 26



# THANK YOU

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