

Chapter 13
Socioeconomic Policies



2014 Contract Attorneys Deskbook

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CHAPTER 13

SOCIOECONOMIC POLICIES

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CHAPTER 13

SOCIOECONOMIC POLICIES

I. INTRODUCTION

- A. Vision of the Acquisition Process
 - 1. Deliver on a timely basis...
 - 2. the best value product or service to the customer,
 - 3. while maintaining the public's trust...
 - 4. and fulfilling **public policy** objectives. FAR 1.102(a) (emphasis added).

II. POLICY AND PROCEDURE IN SUPPORT OF SMALL BUSINESS

- A. **Policy.**¹ [15 U.S.C. §§ 631-650](#); FAR 19.201.
 - 1. Place a “fair proportion”² of acquisitions (prime contracts) with small business concerns.
 - 2. Promote maximum subcontracting opportunity for small businesses. FAR 19.702. Prime contractors must agree to provide small businesses the “maximum practicable opportunity to participate in subcontracts.”

¹ Congress declared its policy in promoting small businesses in 15 U.S.C. § 631. “The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. *Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed.* It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a *fair proportion* of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) *be placed with small-business enterprises*, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.” (italics added).

² The goal for small businesses is that not less than **23%** of the total value of all government prime contract awards should go to small businesses. 15 U.S.C. § 644(g). The goal for service-disabled veteran-owned small businesses is not less than **3%** of the total value of all government prime contract and subcontract awards. 15 U.S.C. § 644(g). The goal for HUBZone small businesses is not less than **3%** of the total value of all government prime contract awards. 15 U.S.C. § 644(g). The goal for women-owned small businesses is not less than **5%** of the total value of all government prime contract and subcontract awards. 15 U.S.C. § 644(g). The goal for socially and economically disadvantaged individual-owned small businesses is not less than **5%** of the total value of all government prime contract and subcontract awards. 15 U.S.C. § 644(g).

3. **Small business defined.** FAR 2.101; FAR 19.001 and 15 U.S.C. § 632.
 - a. Independently owned and operated;
 - b. Not dominant in field in which it is bidding on government contracts; and,
 - c. Meets applicable size standards under FAR 19.102.
4. Most Small Business Programs only apply in the United States or its outlying areas (i.e. Puerto Rico, Guam, U.S. Virgin Islands, American Samoa and others listed in FAR 2.101). See FAR 19.000(b). Note, however, that FAR Part 19.6 (Certificates of Competency and Determinations of Responsibility) does apply worldwide.

B. Size Standards and Size Determination Procedures

1. The Small Business Administration (SBA) establishes small business size standards on an industry-by-industry basis. FAR 19.102(a); see also [13 C.F.R. 121](#).
2. Small business size standards are applied by classifying the product or service being acquired in the industry whose definition best describes the principal nature of the product or service being acquired. FAR 19.102(b).
3. **NAICS Classification.** To establish the applicable size standard, the contracting officer adopts an appropriate product or service classification called a North American Industry Classification System (NAICS) code and *includes it in the solicitation for all acquisitions exceeding the micropurchase threshold.*³ FAR 19.102. The NAICS Manual which explains and defines the codes (from [13 C.F.R. 121.201](#)) is available on the internet at <http://www.census.gov/eos/www/naics/>.
 - a. This NAICS classification establishes the applicable size standard for the acquisition. The contracting officer then specifies in the solicitation this NAICS size standard classification so offerors can appropriately represent themselves as small or large when responding to the solicitation.
 - b. For size standard purposes, a product or service shall be classified in only one NAICS code, whose definition best describes the principal nature of the product or service. FAR 19.102(b)(c); [Technica Corp.](#), SBA No. NAICS-5248, June 20, 2011.

³ The micropurchase threshold is generally \$3,000, but it could be \$15,000 or \$30,000 depending on certain conditions. See Contract Attorney's Deskbook, Chapter 9, Simplified Acquisitions.

- c. **NAICS Code Appeals.** The contracting officer’s NAICS code designation is final unless appealed directly to the SBA’s Office of Hearings and Appeals (OHA) located in Washington, D.C. Any interested party adversely affected by a NAICS code designation may appeal the contracting officer’s NAICS code selection in writing as a matter of right to the SBA’s OHA **no later than 10 calendar days after** the issuance of the initial solicitation; the SBA will summarily dismiss an untimely appeal. The appellant must exhaust the OHA appeal process before seeking judicial review. [13 C.F.R. Part 121.1103](#), and FAR 19.303(c).
 - d. **Delay of opening offers or contract award pending a NAICS code appeal.** See [Aleman Food Serv., Inc.](#), B-216803, Mar. 6, 1985, 85-1 CPD ¶ 277. If the SBA finds the original NAICS code improper, the contracting officer must amend the solicitation to reflect the SBA’s decision *only* if the contracting officer receives the SBA determination before the date offers are due. If the contracting officer receives the SBA’s decision after the date that offers are due, then that decision will apply only to future solicitation of the same products and services. See FAR 19.303(c)(5).
 - e. The GAO does not review NAICS Code appeals (a.k.a. “classification” protests). [A-P-T Research, Inc.—Costs](#), B-298352.3, Sep. 28, 2006, 2007 Comp. Gen. Proc. Dec. P60 (stating that “our Bid Protest Regulations provide that ‘challenges of the selected standard industrial classification may be reviewed *solely* by the Small Business Administration’”); [Tri-Way Sec. & Escort Serv., Inc.](#), B-238115.2, Apr. 10, 1990, 90-1 CPD ¶ 380; [JC Computer Servs., Inc. v. Nuclear Regulatory Comm’n](#), GSBCA No. 12731-P, 94-2 BCA ¶ 26,712; [Cleveland Telecommunications Corporation](#), B-247964, July 23, 1992, 92-2 CPD ¶ 47. However, GAO may recommend an agency comply with an OHA decision that an agency ignores. [Eagle Home Medical Corp.](#), B-402387, Mar. 29, 2010.
4. **Small business certification.** Representations. FAR 19.301.
- a. Self-certification. “To be eligible for award as a small business, an offeror must represent, in good faith, that it is a small business at the time of the written representation.” FAR 19.301. See also [Randolph Eng'g Sunglasses](#), B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39; [United Power Corp.](#), B-239330, May 22, 1990, 90-1 CPD ¶ 494. The “contracting officer shall accept an offeror’s representation . . . that it is a small business unless” another offeror challenges the representation or the contracting officer has reason

to question the representation. FAR 19.301. [AMI Constr.](#), B-286351, Dec. 27, 2000.

- b. SBA certification. The offeror's representation that it is a small business is not binding on the SBA. If an offeror's status as a small business is challenged, then the SBA will evaluate the business' status and make a determination, which is binding on the contracting officer. FAR 19.301-1(c). [MTB Investments, Inc.](#), B-275696, March 17, 1997, 97-1 CPD ¶ 112; [Olympus Corp.](#), B-225875, Apr. 14, 1987, 87-1 CPD ¶ 407.
- c. If an acquisition is set-aside for small business, the failure of the bidder to certify its status *does not*, in and of itself, render the bid nonresponsive. [Last Camp Timber](#), B-238250, May 10, 1990, 90-1 CPD ¶ 461; [Concorde Battery Corp.](#), B-235119, June 30, 1989, 89-2 CPD ¶ 17.
- d. Neither the FAR nor the SBA regulations require a firm to re-certify size status before an agency exercises an option where the agency awarded the original contract on a set-aside basis. See [Vantex Serv. Corp.](#), B-251102, Mar. 10, 1993, 93-1 CPD ¶ 221. *But see* [CMS Info. Servs., Inc.](#), B-290541, Aug. 7, 2002, 2002 CPD ¶ 132 (holding that agency may properly require firms to certify their size status as of the time they submit their quotes for an indefinite delivery/indefinite quantity (IDIQ) task order). *But see* [13 C.F.R. § 121.404\(g\)](#) regarding novations or mergers.
- e. If a contractor misrepresents its status as a small business *intentionally*, the contract is void or voidable. [C&D Constr., Inc.](#), ASBCA No. 38661, 90-3 BCA ¶ 23,256; [J.E.T.S., Inc.](#), ASBCA No. 28642, 87-1 BCA ¶ 19,569, *aff'd*, [J.E.T.S., Inc. v. United States](#), 838 F.2d 1196 (Fed. Cir. 1988). *Cf.* [Danac, Inc.](#), ASBCA No. 30227, 92-1 BCA ¶ 24,519. Additionally, such a misrepresentation may be a false statement under 18 U.S.C. § 1001 and 15 U.S.C. § 645.
- f. Self-certification only applies to status as a small business, minority-owned business, woman-owned business, veteran-owned business, and service-disabled veteran-owned business. SBA certification and approval are *required* for entrance into the 8(a) business development program, and the HUBZone program.

5. **Size status protests** (a.k.a. protesting representation of being a “small business”). FAR 19.302.

- a. Per 19.302(a), “an offeror, the SBA, or another interested party [includes the contracting officer] may challenge *the small business*

representation of an offeror in a specific offer. However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror, the contracting officer, or the SBA.”

- b. A protest is “timely” if received by the contracting officer by close of business of the 5th business day either (1) after bid opening in a sealed bid acquisition or (2) after the protester receives notice of the proposed awardee’s identity in a negotiated acquisition. A size status protest filed by either the contracting officer or by the SBA is always timely whether filed before or after contract award. FAR 19.302. 13 C.F.R. § 121.1004(b),(c). [Alliance Detective & Security Service, Inc.](#) B-299342, Apr. 13, 2007, 2007 Comp Gen. 564; [Eagle Design and Mgmt., Inc.](#), B-239833, Sept. 28, 1990, 90-2 CPD ¶ 259; [United Power Corp.](#), B-239330, May 22, 1990, 90-1 CPD ¶ 494.
- (1) The contracting officer **must forward the protest** (whether timely or not) to the SBA Government Contracting Area Office for the geographic area where the principal office of the business in question is located and **must withhold award** until: (1) the SBA has made a size determination or (2) 10 business days have elapsed since SBA’s receipt of the protest, whichever occurs first, absent a finding of urgency. FAR 19.302(h)(1). [Alliance Detective & Security Service, Inc.](#) B-299342, Apr. 13, 2007, 2007 Comp Gen. 56.⁵ [Aquasis Servs., Inc.](#), B-240841.2, June 24, 1991, 91-1 CPD ¶ 592.
 - (2) The SBA Government Contracting Area Office **must rule within 10 business days** or the contracting officer may proceed with award. FAR 19.302(h)(1). [Systems Research and Application Corp.](#), B-270708, Apr. 15, 1996, 96-1 CPD ¶ 186; [International Ordnance, Inc.](#), B-240224, July 17, 1990, 90-2 CPD ¶ 32. Even if the 10 days have passed and whether or not award has been made, if the SBA rules that

⁴ The GAO reiterated that an SBA protest is always timely. In this case, a Department of Homeland Security (DHS) contracting officer awarded a contract to C&D Security Management, Inc. (C&D) despite pending size status protests. The GAO found timely an SBA size status protest filed over two months after the contracting officer notified the offerors that he intended to award to C&D. Further, because the SBA protest was timely, the GAO found that the SBA’s determination that C&D was not a small business applied to the procurement at issue and so, C&D was not eligible for award. While GAO considered recommending that the contracting officer terminate the contract with C&D, because C&D had already incurred substantial performance costs, GAO recommended that DHS allow C&D to perform during the base performance period, but that it not exercise any of the options available under the contract.

⁵ In this case, the GAO found that a DHS contracting officer’s award of a contract before referring two size status protests to SBA was improper in that he failed to withhold award as required under FAR 19.302.

the awardee is not a small business, the agency should consider that ruling, and award or continue to allow performance at its own peril. [ALATEC](#), B-298730, Dec. 4, 2006, 2006 CPD ¶ 191; [Hydroid LLC](#), B-299072, Jan. 31, 2007, 2007 CPD ¶ 20.⁶ The FAR permits the contracting officer to, when practical, continue to withhold award until the SBA's determination is received. FAR 19.302(h)(1).

- (3) When the SBA Government Contracting Area Office makes its determination within 10 business days, that determination is final, unless appealed. Award may be made on the basis of the SBA's determination. FAR 19.302(g)(2).
 - (4) The SBA Government Contracting Area Office decisions are appealable to the Office of Hearings and Appeals within the time limits contained in [Subpart C of Part 13 C.F.R. 134](#). Agencies need not suspend contract action pending appeals to OHA. If an activity awards to a firm that the Area Office initially finds is "small," the activity need not terminate the contract if the SBA OHA later reverses the Area Office's determination. The SBA's OHA will inform the contracting officer of its ruling on the appeal. If the SBA's decision is received *prior to award*, then that decision will apply to the pending acquisition. SBA OHA's decisions received *after award* shall not apply to that acquisition, however, the SBA OHA may consider this decision in future actions. FAR 19.302(i); [McCaffery & Whitener, Inc.](#), B-250843, Feb. 23, 1993, 93-1 CPD ¶ 168; [Verify, Inc.](#), B-244401.2, Jan. 24, 1992, 92-1 CPD ¶ 107.
- c. In negotiated small business set-asides, the agency must inform each unsuccessful offeror prior to award of the name and location of the apparent successful offeror. FAR 15.503(a)(2) and FAR 19.302(d)(1); [Resource Applications, Inc.](#), B-271079, August 12, 1996, 96-2 CPD ¶ 61; [Phillips Nat'l, Inc.](#), B-253875, Nov. 1, 1993, 93-2 CPD ¶ 252.
 - d. As discussed above, late size status protests (and timely protests filed after contract award) generally do not apply to the current contract under competition; rather, the protest will be considered

⁶ These cases stand for the proposition that even where the requirements of 19.302 have been met by the agency, termination may be appropriate where: 1) a timely protest was filed; 2) the area office found the business not small and there was no appeal of the SBA ruling, and; 3) there are no countervailing circumstances that weigh in favor of allowing a 'not small' business to continue performance. In short, letting a 'known' large business perform a small-business set-aside is going to be frowned upon by GAO.

for future actions. FAR 19.302(j). See [Chapman Law Firm v. United States](#), 63 Fed. Cl. 25 (2004). But see [Adams Indus. Servs., Inc.](#), B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56 (protester filed protest after award; however, under the circumstances of this procurement, simplified acquisition procedures did not require the agency to issue a pre-award notice to unsuccessful vendors. Since the protest was filed within 5 days after the protester received notice of the issuance of a purchase order to the awardee, the protest was considered timely).

- e. The GAO does not review size protests. [McCaffery & Whitener, Inc.](#), *supra* (stating that the Small Business Act . . . gives the SBA, not our Office, the exclusive and conclusive authority to determine matters of small business size status for federal procurement); [DynaLantic Corp.](#), B-402326, Mar. 15, 2010, 2010 CPD ¶ 103; [Hughes Group Sol.](#), B-408781.2, Mar. 5, 2014, 2014 CPD ¶ 91.
- f. Courts will not overrule a SBA determination unless it is arbitrary, capricious, an abuse of discretion, or not in accordance with law or regulation. [STELLACOM, Inc. v. United States](#), 24 Cl. Ct. 213 (1991).

C. Responsibility Determinations and Certificates of Competency (COCs).

- 1. [Federal Acquisition Streamlining Act of 1994](#), Pub. L. No. 103-355, § 7101, 108 Stat. 3243, 3367 [hereinafter FASA] (repealing § 804, National Defense Authorization Act, 1993, Pub. L. No. 102-484), 106 Stat. 2315, 2447 (1992); FAR Subpart 19.6, DFARS PGI 219.6.
- 2. The contracting officer must determine an offeror's responsibility. FAR 9.103(b).
- 3. **Responsibility defined:** Prospective contractors must have adequate resources, be capable of complying with proposed delivery schedules, have a satisfactory performance record; have a satisfactory record of business integrity and ethics; have the necessary organization, experience, accountability measures, etc; have the necessary production/technical equipment/facilities; and be qualified and eligible to receive award. FAR 9.104.
- 4. **Certificate of Competency Program.** This program empowers the SBA to certify to a contracting officer that a small business is responsible so that it can perform a particular government contract. *If the contracting officer finds a small business nonresponsible, he or she **must** forward the matter to the SBA Government Contracting Area Office immediately and must withhold award (for 15 business days after receipt by SBA).* FAR

19.602-1(a)(2). Then the SBA will notify the business of the contracting officer's determination and offer the business the opportunity to apply for a COC. If the business applies for a COC, then the SBA will either *issue a COC* (if it finds the business responsible) or the SBA will *deny the COC*. FAR 19.602-2.

5. The SBA issues a COC if it finds that the offeror is responsible.
 - a. The burden is on the offeror to apply for a COC. FAR 19.602-2(a). [Thomas & Sons Bldg. Contr., Inc.](#), B-252970.2, June 22, 1993, 93-1 CPD ¶ 482.
 - b. The contracting officer may appeal a decision to issue a COC if the contracting officer and the SBA disagree regarding a small business concern's ability to perform. For COCs valued between \$100,000 and \$25,000,000, the SBA Associate Administrator for Government Contracting will make the final determination on whether to issue a COC. For COCs valued over \$25,000,000, the SBA Headquarters will make the final determination. See FAR 19.602-3; AFARS 5119.602-3; [Holiday Inn-Laurel—Protest and Request for Costs](#), B-270860.3, B-270860.4, May 30, 1996, 96-2 CPD ¶ 259.
6. The contracting officer "shall" award to another offeror if the SBA does not issue a COC within 15 business days of receiving a referral. FAR 19.602-4(c); [Mid-America Eng'g and Mfg.](#), B-247146, Apr. 30, 1992, 92-1 CPD ¶ 414. Cf. [Saco Defense, Inc.](#), B-240603, Dec. 6, 1990, 90-2 CPD ¶ 462.
7. If the SBA refuses to issue a COC, the contracting officer need not refer the case back to the SBA upon presentation of new evidence by the contractor. [Discount Mailers, Inc.](#), B-259117, Mar. 7, 1995, 95-1 CPD ¶ 140.
8. Once the SBA issues a COC, it is *conclusive* as to all elements of responsibility. So, once the contracting officer receives notice of the COC, the contracting officer *must* award the contract to the small business. FAR 19.602-4. GAO review of the COC process is limited to determining whether government officials acted in bad faith or failed to consider vital information. [The Gerard Co.](#), B-274051, Nov. 8, 1996, 96-2 CPD ¶ 177; [UAV Sys., Inc.](#), B-255281, Feb. 17, 1994, 94-1 CPD ¶ 121; [J&J Maint., Inc.](#), B-251355.2, May 7, 1993, 93-1 CPD ¶ 373.
9. The COC procedure does not apply when an agency declines to exercise an option due to responsibility-type concerns. [E. Huttenbauer & Son, Inc.](#), B-258018.3, Mar. 20, 1995, 95-1 CPD ¶ 148.

10. The COC procedure generally does not apply when the contracting officer rejects a technically unacceptable offer. See [Paragon Dynamics, Inc.](#), B-251280, Mar. 19, 1993, 93-1 CPD ¶ 248; [Pais Janitorial Serv. & Supplies, Inc.](#), B-244157, June 18, 1991, 91-1 CPD ¶ 581; compare with [Fabritech, Inc.](#), B-298247, July 27, 2006.
11. The COC procedure applies when an agency determines that a small business contractor is nonresponsible based solely on a pass/fail evaluation of the firm's past performance. See [Phil Howry Co.](#), B-291402.3, B-291402.4, Feb. 6, 2003. 2003 CPD ¶ 33.

D. Regular Small Business Set-Asides

FAR Subpart 19.5.

1. The decision to set aside a procurement for participation only by small businesses is a business judgment within the discretion of the contracting officer, which will not be disturbed absent a showing that it was unreasonable with that discretion limited by various provisions of law and regulation.⁷ The SBA may also *sua sponte* recommend that a certain acquisition be set aside for small businesses. FAR 19.501; [Neal R. Gross & Co.](#), B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53; [Espey Mfg. & Elecs. Corp.](#), B-254738.3, Mar. 8, 1994, 94-1 CPD ¶ 180.
2. The agency must exercise its discretion reasonably and in accordance with statutory and regulatory requirements. [DCT Inc.](#), B-252479, July 1, 1993, 93-2 CPD ¶ 1; [Neal R. Gross & Co.](#), B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53; [Quality Hotel Offshore](#), B-290046, May 31, 2002, 2002 CPD ¶ 91.
3. DFARS 219.201(d) requires small business specialist review of all acquisitions over \$10,000, except those restricted for exclusive small business participation under FAR 19.502-2 (which *may* be reviewed). PGI 219.201(d)(10).
4. Types of set-asides:
 - a. Total Set-Asides
 - (1) Acquisitions between \$3,000 and \$150,000. [15 U.S.C. § 644\(j\)](#), [13 CFR 125.2\(f\)\(1\)](#), and FAR 19.502-2(a).

⁷ Under FAR 19.203, SDVOSB, HUBZone, WOSB and 8(a) requirements take priority over small business concerns generally. See also OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB MEMO. NO. 09-23, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (2009) (stating that for Executive Branch agencies “the applicable SBA ‘parity’ regulations remain binding and in effect as validly-promulgated implementations of the governing statutes.”; see also DIRECTOR, DEFENSE PROCUREMENT AND ACQUISITION, MEMO RE: SMALL BUSINESS ADMINISTRATION PARITY REGULATION, May 8, 2010 (updating similar 29 July 2009 Memo). See also Section IV of this chapter.

Acquisitions in this range are *automatically* reserved for small business concerns and the contracting officer *shall* set aside any acquisition with an anticipated dollar value exceeding \$3,000 but not greater than \$150,000 for small businesses unless an exception applies.⁸

(a) Exceptions.

(i) There is no requirement to set aside if there is no reasonable expectation of receiving offers from two or more responsible small businesses that will be competitive in terms of “market prices, quality, and delivery.”

(ii) Overseas? [Latvian Connection, LLC](#), B-408633, Sept. 18, 2013, 2013 CPD ¶ 224. The Small Business Act does not require agencies to set aside for small businesses located outside the U.S. procurements valued under the simplified acquisition threshold when the SBA is silent and FAR Part 19 is expressly limited to the United States (FAR 19.000(b)).

(2) Acquisitions over \$150,000.⁹ FAR 19.502-2(b). The contracting officer *shall* set aside any acquisition over \$150,000 for small business participation *if* the contracting officer reasonably expects that:

(a) “Offers will be obtained from at least two responsible small businesses” and,¹⁰

⁸ The actual statutory language states, “Each contract for the purchase of goods and services that has an anticipated value greater than \$2,500 [raised to \$3,000; see FAR 19.502-2(a)] but not greater than \$100,000 [raised to \$150,000; *Id*] shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the good or services being purchased.”

⁹ FAR 19.502-2(b) also applies to multiple-award ID/IQ delivery orders. *Delex Systems, Inc.* Comp. Gen. B-400403, Oct. 8, 2008 (opining that each order is considered an acquisition and therefore the Rule of Two applies, at least where there are small businesses among the ID/IQ awardees).

¹⁰ Note that the actual FAR language states:

(b) The contracting officer shall set aside any acquisition over \$150,000 for small business participation when there is a reasonable expectation that –

(1) offers will be obtained from at least two responsible business concerns offering the products of different small business concerns . . .

- (b) “Award will be made at fair market prices.” [Adams & Assoc., v. United States](#), 741 F.3D 102, 110 (Fed. Cir. 2014).
- (3) Is there any real difference? While the language in the FAR is similar, the real difference lies in the interaction with other SBA programs. For acquisitions over \$150,000, the contracting officer MUST consider the 8(a), HUBZone, WOSB, and SDVOSB programs before using a small business set aside (See Parts III and IV).
- b. **Partial.** FAR 19.502-3; [Aalco Forwarding, Inc., et. al.](#), B-277241.16, Mar. 11, 1998, 98-1 CPD ¶ 75. The contracting officer *shall* set aside a portion of an acquisition, except for construction, for exclusive small business participation when:
- (1) A total set-aside is not appropriate;
- (2) The requirement is severable into two or more economic production runs or reasonable lots;
- (3) One or more small business concerns are expected to have the technical competence and capacity to satisfy the requirement at a fair market price. (Note if the contracting officer only expects one capable small business to respond, then a partial set aside will not be made, unless authorized by the head of the contracting activity); and
- (4) The acquisition is not subject to simplified acquisition procedures
- (5) Note: A partial set aside will not be made if there is a reasonable expectation that only two concerns (one large and one small) with capability will respond to the solicitation (FAR 19.502-3(5)).
5. **Limitations on Subcontracting by Small Businesses.** If the agency sets aside an acquisition, certain subcontracting and domestic end item limitations apply to the small business awardee. See 15 U.S.C. § 657s, [13 C.F.R. § 125.6](#) and FAR 52.219-14. See also [Innovative Refrigeration Concepts](#), B-258655, Feb. 10, 1995, 95-1 CPD ¶ 61; [Adrian Supply Co.](#),

FAR 19.502-2. The language “offering the products of different small business concerns” is often overlooked by courts and boards without explanation. *See e.g. FTF Restoration Co., LLC v. United States*, 86 Fed. Cl. 226 (Fed. Cl. 2009). Though outside the scope of this outline, practitioners should note the non-manufacturer rule in 13 C.F.R. 121.406.

B-257261, Sept. 15, 1994, 95-1 CPD ¶ 21; [Kaysam Worldwide, Inc.](#), B-247743, June 8, 1992, 92-1 CPD ¶ 500.

- a. Services. The contractor may not expend on subcontractors more than 50% of the amount paid to the concern under the contract.
 - b. Supplies.
 - (1) The contractor (other than a regular dealer in such supplies) may not expend on subcontractors more than 50% of the amount, less the cost of materials, paid to the concern under the contract.
 - (2) In the case of a regular dealer in supplies, the dealer must supply the product of a domestic small business, unless waived.
 - c. Construction. Section 1651 of the 2013 NDAA required the SBA to establish requirements for general and specialty construction. As of the summer of 2013, the SBA had not done so. The [prior regulation](#), which is still in effect, requires at least 15% of the cost of the contract to be spent on in-house employees for general construction and 25% of the cost of the contract on in-house employees for special trade construction.
 - d. If the contract includes both service and supply requirements, look to whichever is the greatest percentage and then apply the above rules.
 - e. Similarly situated entities. The Sec. 1651 of the 2013 NDAA also amended the treatment of “similarly situated entities.” Contract amounts expended by a covered small business on a similarly situated small business shall not be considered subcontracted for purchases of the thresholds. E.g., if a 8(a) subcontracts to another 8(a), it is treated for purposes of the threshold as if the prime was doing that work.
6. Rejecting SBA set-aside recommendations and withdrawal of set-asides. FAR 19.505, 19.506.
- a. The contracting officer may reject a SBA recommendation or withdraw a set-aside before award, however, the contracting officer must notify the SBA of the rejection. The SBA may then appeal the rejection to the head of the contracting activity. FAR 19.505, DFARS 219.505, and AFARS 5119.505.
 - b. The FAR sets forth notice and appeal procedures for resolving disagreements between the agency and the SBA. If the contracting

agency and the SBA disagree, the contracting agency has the final word on set-aside or withdrawal decisions.

- c. Potential offerors also may challenge the contracting officer's decision to issue unrestricted solicitations or withdraw set-asides. [DMS Pharmaceutical Group, Inc.](#), B-406305, 2012 CPD ¶ 140; [Aerostructures, Inc.](#), B-280284, Sep. 15, 1998, 98-2 CPD ¶ 71; [American Imaging Servs.](#), B-238969, July 19, 1990, 90-2 CPD ¶ 51.
 - d. If the activity receives *no* small business offers or the contracting officer determines that award would be "detrimental to the public interest," the contracting officer may not simply award the contract to a large business but rather, must withdraw the solicitation and resolicit on an unrestricted basis (allowing the potential for both small and large businesses to compete). FAR 19.506. [Western Filter Corp.](#), B-247212, May 11, 1992, 92-1 CPD ¶ 436; [CompuMed](#), B-242118, Jan. 8, 1991, 91-1 CPD ¶ 19; [Ideal Serv., Inc.](#), B-238927.2, Oct. 26, 1990, 90-2 CPD ¶ 335.
7. An agency is not required to set aside the reprourement of a defaulted contract. FAR 49.405. [Premier Petro-Chemical, Inc.](#), B-244324, Aug. 27, 1991, 91-2 CPD ¶ 205.

III. PROGRAMS FOR SMALL DISADVANTAGED BUSINESSES

A. **Contracting with the SBA's "8(a)" Business Development Program.** 15 U.S.C. § 637(a); 13 C.F.R. Part 124; FAR Subpart 19.8.

- 1. **Policy.** The primary program in the federal government designed to assist small disadvantaged businesses is commonly referred to as the "8(a) program." The program derives its name from Section 8(a) of the Small Business Act. Section 8(a) authorizes the SBA to enter into contracts with other federal agencies. The SBA then subcontracts with eligible small disadvantaged businesses (SDBs). [15 U.S.C. § 637\(a\)](#). The purpose of the 8(a) program is to "assist eligible small disadvantaged business concerns [to] compete in the American economy through business development." [13 C.F.R. § 124.1](#).
 - a. By Partnership Agreement (PA), dated 27 Sept. 2012, between DOD and the SBA, the SBA delegated its authority to DOD to enter into 8(a) prime contracts with 8(a) contractors. The PA can be found with [DFARS PGI 219.800](#). Per the PA, the DOD contracting officers can bypass the SBA and contract *directly* with 8(a) SDBs on behalf of the SBA. The DOD contracting officers *only* have the authority to sign contracts on behalf of the SBA. The SBA remains the prime contractor on all 8(a) contracts,

continues to determine eligibility of concerns for contract award, and retains appeal rights under FAR 19.810. *See* DFARS 219.800.

- b. Either the SBA or the contracting activity may initiate selection of a requirement or a specific contractor for an 8(a) acquisition. FAR 19.803; [DFARS PGI 219.803](#)
- c. Businesses must meet the criteria set forth in [13 C.F.R. §§ 124.101 - 124.112](#) to be eligible under the 8(a) program. FAR 19.802; [Autek Sys. Corp.](#), 835 F. Supp. 13 (D.D.C. 1993), *aff'd*, 43 F.3d 712 (D.C. Cir. 1994).
 - (1) The firm must be “owned and controlled by...socially *and* economically disadvantaged individuals.” 13 C.F.R. § 124.101. The regulations require 51% ownership and control by one or more individuals who are *both* socially *and* economically disadvantaged. [13 C.F.R. § 124.105](#). *See also* [Software Sys. Assoc. v. Saiki](#), No. 92-1776 (D.D.C. June 24, 1993) 19,932 F.3d 1143; [SRS Technologies v. United States](#), No. 95-0801 (D.D.C. July 18, 1995) 894 F.Supp. 8.
 - (a) “**Socially disadvantaged**” individuals are those who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.” [13 C.F.R. § 124.103\(a\)](#).
 - (i) There is a “rebuttable presumption” that members of the following designated groups are socially disadvantaged: Black Americans, Hispanic Americans, Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians), Asian Pacific Americans, among others. [13 C.F.R. § 124.103\(b\)\(1\)](#).
 - (ii) Individuals who are not members of designated socially disadvantaged groups must establish individual social disadvantage by a “preponderance of the evidence.” [13 C.F.R. § 124.103\(c\)\(1\)](#). Previously, individuals not members of designated groups needed to prove social

disadvantage by “clear and convincing evidence.”

(b) “**Economically disadvantaged**” individuals are “socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished credit capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” [13 C.F.R. § 124.104\(a\)](#).

(i) In considering diminished capital and credit opportunities, the SBA will consider such factors as:

- a. Personal income for the last two years;
- b. Personal net worth and the fair market value of all assets; and
- c. Financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification.

(ii) Net Worth. [13 C.F.R. § 124.104\(c\)](#). For initial 8(a) eligibility, the net worth of an individual claiming disadvantage must be *less than \$250,000*. For continued 8(a) eligibility, net worth must be *less than \$750,000*. (Note “net worth” excludes the value of the primary personal residence)

(2) The firm must possess the “potential for success.” 15 U.S.C. § 637(a)(7) and [13 C.F.R. § 124.107](#). One aspect of “potential for success” is the requirement that the firm must have been in business for two full years in the industry for which it seeks certification. The SBA is responsible for determining which firms are eligible for the 8(a) program. The SBA has reasonable discretion to deny participation in the 8(a) program to clearly unqualified firms as long as applications receive careful and thorough review. See [Neuma Corp. v. Abdnor](#), 713 F. Supp. 1 (D.D.C. 1989).

d. The firm must have an approved business plan. 15 U.S.C. § 636(j)(10)(A)(i).

- e. Generally, per [13 C.F.R. § 124.504](#), the SBA will not accept a procurement for award as an 8(a) contract if:
 - (1) An activity already has issued a solicitation with the intent to set aside the procurement for small businesses or SDBs prior to offering the requirement to SBA;
 - (2) The SBA determines that inclusion of a requirement in the 8(a) program will affect a small business or SDB adversely. [13 C.F.R. § 124.504\(c\)\(1\)-\(3\)\(2004\)](#). See [Designer Assocs.](#), B-293226, Feb. 12, 2004 ¶; [C. Martin Co., Inc.](#), B-292662, Nov. 6, 2003, CPD ¶ 2007; [John Blood](#), B-280318, Aug. 31, 1998, 98-2 CPD ¶ 58; [McNeil Technologies, Inc.](#), B-254909, Jan. 25, 1994, 94-1 CPD ¶ 40.

2. **Procedures.** [13 C.F.R. § 124.](#)

- a. If the activity decides that an 8(a) contract is feasible and desirable, it offers SBA an opportunity to participate. Contracts currently performed by an 8(a) via the 8(a) BD program must remain in the 8(a) BD program unless the SBA allows the requirement to be released. This includes follow on contracts. See [13 C.F.R. §124.505](#).
- b. Contracts may be awarded to the SBA (or directly to the 8(a) contractor for DoD) for performance by eligible 8(a) firms “on either a sole source or competitive basis.” FAR 19.800(b).
- c. If the SBA accepts, the agency or the SBA chooses a contractor, or eligible firms compete for award. See [Defense Logistics Agency and Small Bus. Admin. Contract No. DLA100-78-C-5201](#), B-225175, Feb. 4, 1987, 87-1 CPD ¶ 115. Frequently, SBA chooses only one contractor to perform. If so, such a sole-source acquisition is an exception to “full and open competition” authorized under FAR Part 6.2 (referred to as “full and open competition after exclusion of sources”).
- d. Per FAR 19.805-1, activities must generally compete larger 8(a) acquisitions if:
 - (1) The activity expects offers from two eligible, responsible 8(a) firms at a fair market price, see [Horioka Enters.](#), B-259483, Dec. 20, 1994, 94-2 CPD ¶ 255; *and*
 - (2) The value of the contract is expected to exceed \$6.5 million for actions assigned manufacturing NAICS codes or \$4 million for all other codes. See [13 C.F.R. § 124.506\(a\)](#);

FAR § 19.805-1(a)(2). The threshold applies to the agency's estimate of the total value of the contract, including all options.

- (3) Where the acquisition exceeds these thresholds, the SBA may still accept the acquisition for sole-source award if:
 - (a) There is no reasonable expectation that at least two eligible 8(a) firms will submit fair market offers; or
 - (b) The SBA accepts the requirement on behalf of a concern owned by an Indian tribe or an Alaskan Native Corporation. FAR 19-805-1(b). In DOD, this also includes Native Hawaiian Organizations. FAR 219.805-1(b)(2).
 - (4) The contracting officer must prepare a written Justification & Approval (J&A) to sole source to an 8(a) if an acquisition exceeds \$20 million. FAR 19.808-1; FAR 6.303. Any sole source to an 8(a) with a value over \$20 million must be approved by an appropriate agency official (as currently defined by FAR 6.304) and made public after award. FAR 6.303.
- e. The COC procedures do not apply to sole source 8(a) acquisitions. [DAE Corp. v. SBA](#), 958 F.2d 436 (1992); [Action Serv. Corp. v. Garrett](#), 797 F. Supp. 82 (D.P.R. 1992); [Joa Quin Mfg. Corp.](#), B-255298, Feb. 23, 1994, 94-1 CPD ¶ 140; [Aviation Sys. & Mfg., Inc.](#), B-250625.3, Feb. 18, 1993, 93-1 CPD ¶ 155; [Alamo Contracting Enters.](#), B-249265.2, Nov. 20, 1992, 92-2 CPD ¶ 358.
- f. Subcontracting limitations apply to competitive 8(a) acquisitions.¹¹ [13 C.F.R. § 125.6](#); See FAR 52.219-14; [Tonya, Inc. v. United States](#), 28 Fed. Cl. 727 (1993); [Jasper Painting Serv., Inc.](#), B-251092, Mar. 4, 1993, 93-1 CPD ¶ 204.
- g. Partnership between General Services Administration (GSA) and SBA.¹²
- (1) SBA agreed to accept all 8(a) firms in GSA's Multiple Award Schedule Program.
 - (2) Agencies that buy from a Federal Supply Schedule 8(a) contractor may count the purchase toward the agency's small business goals.

¹¹ See Section II.C.5 *infra* for more information of subcontracting limitations.

¹² Press release highlighting agreement available at <http://ftp.sbaonline.sba.gov/news/current00/00-58.pdf>.

h. Graduation from 8(a) program. A firm “graduates” from the 8(a) program when it “completes its nine year term of participation in the 8(a) business development program.” This nine year term may be shortened by termination, early graduation, or voluntary graduation under [13 C.F.R. § 124.3](#). See [Gutierrez-Palmenberg, Inc.](#), B-255797.3, Aug. 11, 1994, 94-2 CPD ¶ 158.

(1) 8(a) time period upheld. [Minority Bus. Legal Defense & Educ. Funds, Inc. v. Small Bus. Admin.](#), 557 F. Supp. 37 (D.D.C. 1982). No abuse of discretion by refusing to keep a contractor in 8(a) program beyond nine years. [Woerner v. United States](#), 934 F.2d 1277 (App. D.C. 1991).

i. GAO Protests

(1) GAO normally will not review a contracting officer’s decision to set aside a procurement under the 8(a) program absent a showing of possible bad faith on the part of the government officials or that regulations may have been violated. [4 C.F.R. § 21.5\(b\)\(3\)](#). See [American Consulting Servs., Inc.](#), B-276149.2, B-276537.2, July 31, 1997, 97-2 CPD ¶ 37; [Comint Sys. Corp.](#), B-274853, B-274853.2, Jan. 8, 1997, 97-2, CPD ¶ 14. See also, [Rothe Computer Solutions](#), B-299452, May 9, 2007.

(2) The GAO will not consider challenges to an award of an 8(a) contract by contractors that are not eligible for the program or particular acquisition. [13 C.F.R. § 124.1007\(a\)](#); [CW Constr. Servs. & Materials, Inc.](#), B-279724, July 15, 1998, 98-2 CPD ¶ 20 (SBA reasonably determined that protestor was ineligible for award of 8(a) construction contract because it failed to provide sufficient information to show that it established and maintained an office within geographical area specified in solicitation as required by SBA regulations); [AVW Elec. Sys., Inc.](#), B-252399, May 17, 1993, 93-1 CPD ¶ 386. Likewise, the GAO will not consider challenges to a SBA decision that an 8(a) contractor is not competent to perform a contract. [L. Washington & Assocs.](#), B-255162, Oct. 19, 1993, 93-2 CPD ¶ 254.

3. **Mentor/Protégé Program.** [13 C.F.R. § 124.520](#).

a. The Mentor/Protégé Program is designed to encourage approved mentors to provide various forms of assistance to eligible 8(a) contractors. The purpose of mentor/protégé relationship is to enhance the capabilities of the protégé and to improve its ability to

successfully compete for contracts. (Sec. 1641 of the 2013 National Defense Authorization Act provided a statutory framework for a mentor-protégé program for agencies other than the DOD, which already had a program in place.) This assistance may include:

- (1) Technical and/or management assistance;
 - (2) Financial assistance in the form of equity investments and/or loans;
 - (3) Subcontracts; and
 - (4) Joint ventures arrangements.
- b. Mentors. Any concern that demonstrates a commitment and the ability to assist an 8(a) contractor may act as a mentor. “This includes businesses that have graduated from the 8(a) BD program, firms that are in the transitional stage of program participation, other small businesses, and large businesses.” [13 C.F.R. § 124.520\(b\)](#).
- c. A mentor benefits from the relationship in that it may:
- (1) Joint venture as a small business for any government procurement;
 - (2) Own an equity interest in the protégé firm up to 40%; and
 - (3) Qualify for other assistance by the SBA.

B. Challenges to the 8(a) Program

1. [Adarand Constructors, Inc. v. Pena](#), 515 U.S. 200 (1995). In a five to four holding, the Supreme Court declared that all racial classifications, whether benign or pernicious, must be analyzed by a reviewing court using a “**strict scrutiny**” standard. Thus, only those affirmative action programs that are narrowly tailored to achieve a compelling government interest will pass constitutional muster. [Cf. American Federation of Government Employees \(AFL-CIO\) v. United States](#), 195 F. Supp. 2d 4 (D.D.C. 2002) (holding that the rational basis standard is still applicable to “political” (e.g. Native-American) rather than racial classifications).
2. Post-[Adarand](#) Reactions and Initiatives. [See 49 C.F.R. § 26](#) (current DOT regulations implementing Disadvantaged Business Enterprise program).
3. Post-[Adarand](#) Cases. [Sherbrooke Turf Inc. v. Minn. Dep’t of Transp.](#), 2001 U.S. Dist. LEXIS 19565 (Nov. 14, 2001); [Cache Valley Elec. Co. v.](#)

[State of Utah](#), 149 F.3d 1119 (10th Cir. 1998); [Cortez III Serv. Corp. v. National Aeronautics & Space Admin.](#), 950 F. Supp. 357 (D.D.C. 1996); [Ellsworth Associates v. U.S.](#), 917 F. Supp. 841 (D.D.C. 1996).

4. [Adarand](#) on Remand. [Adarand Constructors, Inc. v. Pena](#), 965 F. Supp. 1556 (D. Colo. 1997). *But see* [Adarand Constructors, Inc. v. Slater](#), 169 F.3d 1292 (10th Cir. 1999); [Adarand Constructors, Inc. v. Slater](#), 120 S. Ct. 722 (2000). [Adarand Constructors, Inc., v. Slater](#), 228 F. 3d 1147 (10th Cir. 2000).
5. [Rothe Development Corporation v. Department of Defense](#), 545 F.3d 1023 (2008). In this decision the United States Court of Appeals, Federal Circuit held that 10 U.S.C. § 2323, granting evaluation preferences to small disadvantaged businesses (SDBs), failed to withstand strict scrutiny analysis and violated the equal protection clause. The court found that there was not sufficient evidence to show a national pattern of discrimination in either private or public contracting. This was a fact-specific case and does not unequivocally rule out any future SDB-like programs. In accordance with class deviation 2010-O0006, March 12, 2010, non DOD KOs can utilize FAR 19.11, DFARS 219.11, which was based upon 10 U.S.C. § 2323.

C. Historically Underutilized Business Zone (HUBZone).

HUBZone Act of 1997, Title VI of [Public Law 105-135](#), enacted on December 2, 1997 (111 Stat. 2592). Incorporated at FAR Subpart 19.13.

1. The purpose of the HUBZone program is to provide federal contracting assistance for **qualified small business concerns** located in **historically underutilized business zones** in an effort to increase employment opportunities. [13 C.F.R. § 126.100](#), FAR 19.1301, *et. seq.*
2. The program applies to all federal departments and agencies that employ contracting officers. [13 C.F.R. § 126.101](#).
3. Benefits to HUBZone Small Business Concerns (SBCs) include price preferences and set asides.
4. Methods of Acquisition:
 - a. Awards to qualified HUBZone SBCs through **full and open competition**. For these acquisitions, a **price preference** of 10% is generally applied in acquisitions expected to exceed the simplified acquisition threshold against non-HUBZone SBCs or other small-business concerns. The price preference is applied by adding a factor of 10% to all offers except: (1) offers from HUBZone small businesses and (2) otherwise successful offers from other small businesses. FAR 19.1307.

- b. **Set aside awards;** FAR 19.1305.
 - (1) **Order of Precedence.** There is no longer any order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15). FAR 19.203.
 - (2) **Permissive set-asides.** For these acquisitions, a contracting officer **may** set aside an acquisition that exceeds the micro-purchase threshold for competition restricted to HUBZone SBCs if the contracting officer has a reasonable expectation that: (1) he/she will receive offers from two or more HUBZone SBCs and (2) award will be made at fair market price. FAR 19.1305(a).
 - c. **Sole source awards** to HUBZone SBCs. FAR 19.1306. A contracting officer **may** award a contract to a HUBZone SBC on a sole source basis if: (1) only one HUBZone SBC can satisfy the requirement, (2) the anticipated price of the contract (including options) will not exceed \$6.5M for NAICS codes for manufacturing or \$4M for any other NAICS codes, (3) the requirement is not being performed by another HUBZone SBC, (4) the acquisition is greater than the simplified acquisition threshold, (5) the HUBZone SBC has been determined to be a responsible contractor, and (6) award can be made at a fair and reasonable price.
5. Requirements to be a Qualified HUBZone Small Business Concern¹³ (SBC). 13 C.F.R. § 126.103 and FAR 19.1303.
- a. The concern must be a HUBZone SBC as defined by [13 C.F.R. § 126.103](#);

¹³ HUBZone small business concern (HUBZone SBC) means an SBC that is: (1) At least 51% owned and controlled by 1 or more persons, each of whom is a United States citizen; or (2) An Alaskan Native Corporation (ANC) owned and controlled by Natives (as determined pursuant to section 29(e)(1) of the ANCSA, [43 U.S.C. 1626\(e\)\(1\)](#)) or; (3) A direct or indirect subsidiary corporation, joint venture, or partnership of an ANC qualifying pursuant to section 29(e)(1) of the ANCSA, [43 U.S.C. 1626\(e\)\(1\)](#)), if that subsidiary, joint venture, or partnership is owned and controlled by Natives (as determined pursuant to section 29(e)(2) of the ANCSA, [43 U.S.C. 1626\(e\)\(2\)](#)); or (4) Wholly owned by one or more Indian Tribal Governments, or by a corporation that is wholly owned by one or more Indian Tribal Governments; or (5) a small business that is owned in part by one or more Indian Tribal Governments or in part by a corporation that is wholly owned by one or more Indian Tribal Governments, if all other owners are either U.S. citizens or small businesses; or (6) a small business that is wholly owned by a CDC or owned in part by one or more CDCs, if all other owners are either United States citizens or SBCs; or (7) a small business that is a small agricultural cooperative organized or incorporated in the United States, wholly owned by one or more small agricultural cooperatives organized or incorporated in the United States or owned in part by one or more small agricultural cooperatives organized or incorporated in the United States, provided that all other owners are small business concerns or United States citizens. 13 C.F.R. § 126.103.

- b. At least 35 percent of the concern's employees must reside in a HUBZone, and the HUBZone SBC must certify that it will attempt to maintain this percentage during the performance of any HUBZone contract it receives. [13 C.F.R. § 126.200](#).
 - c. If the SBA determines that a concern is a qualified HUBZone SBC, it will issue a certification to that effect and will add the concern to the List of Qualified HUBZone SBCs. This list can be found on the internet at the SBA's HUBZone website: <https://eweb1.sba.gov/hubzone/internet/index.cfm>. A firm on that list is eligible for HUBZone program preference without regard to the place of performance. The concern must appear on the list to be considered a HUBZone SBC.
 - d. A joint venture may be considered a HUBZone SBC if the concern meets the criteria in [13 C.F.R. 126.616](#).
 - e. An owner of a HUBZone SBC is a person who owns any legal or equitable interest in the concern. More specifically, SBCs included: corporations, partnerships, sole proprietorships and limited liability companies. [13 C.F.R. § 126.201](#).
- 6. **Size standards.** [13 C.F.R. § 126.203](#). At time of application for certification, a HUBZone SBC must meet SBA's size standards for its primary industry classification.
 - 7. **Certification.** [13 C.F.R. § 126.300](#). A SBC must apply to the SBA for certification to be considered a HUBZone SBC.
 - 8. **Subcontracting Limitations.** *See* section II.D.5. *infra*, for the subcontracting rules that reflect the 2013 NDAA amendments.
 - 9. **Protest Procedures.** FAR 19.306; [13 C.F.R. § 126.801](#).
 - a. Protests based upon type of acquisition. For sole source acquisitions, the SBA or the contracting officer may protest the apparently successful offeror's HUBZone SBC status. For all other acquisitions, an offeror, the SBA, or the contracting officer may protest the apparently successful offeror's HUBZone SBC status.
 - b. Who May Protest and When to Protest. FAR 19.306.
 - (1) An offeror must submit its protest in writing to the contracting officer no later than (1) the 5th business day after bid opening or (2) the 5th business day after notification by the contracting officer of the apparently successful offeror. The contracting officer will forward the

offeror's protest to the SBA's Associate Administrator for the HUBZone Program for decision. Premature protests will be returned to the protester.

- (2) Protests submitted by a contracting officer or by the SBA must be submitted in writing to the SBA's Associate Administrator for the HUBZone Program for a decision.
- (3) The SBA will determine the HUBZone status of the protested HUBZone small business within 15 business days after receiving the protest. The SBA's decision is final unless overturned on appeal by the SBA's Associate Deputy Administrator for Government Contracting and 8(a) Business Development. If the SBA does not contact the contracting officer with its decision within 15 business days, the contracting officer may award the contract to the apparently successful offeror.

D. Service-Disabled, Veteran-Owned Small Businesses. FAR 19.14; 13 C.F.R. § 125.8 to 125.29

1. The purpose of the Service-Disabled Veteran-Owned Small Business (SDVOSB) Program is to provide federal contracting assistance to these businesses. Status as a SDVOSB is determined in accordance with [13 C.F.R. Parts 125.8-125.13](#). FAR 19.14. SDVOSB status protests are handled similar to HUBZone status protests, discussed *supra*, sec. III.C.9.; FAR 19.307.
2. **Set-Asides authorized.** A contracting officer *may* set aside acquisitions exceeding the micro-purchase threshold for competition restricted to SDVOSB concerns if the contracting officer has a reasonable expectation that: (1) offers will be received from two or more SDVOSBs and (2) award will be made at a fair market price.
3. **Sole Source awards authorized.** A contracting officer *may* award contracts to SDVOSBs on a sole source basis if: (1) only one such business can satisfy the requirement, (2) the anticipated award price of the contract (including options) will not exceed \$6M for a requirement with a NAICS code for manufacturing or \$3.5M for all other NAICS codes, (3) the SDVOSB has been determined to be responsible, and (4) award can be made at a fair and reasonable price. [13 C.F.R. § 125.20](#)

E. The Women-Owned Small Business (WOSB) Program. [15 U.S.C. § 637\(m\)](#); FAR 19.15.

1. Subpart 19.15 was added to the FAR to address recent statutory amendments and changes in the SBA's regulations concerning the women-owned small business program. The Small Business Act had

previously established a Government-wide goal for participation by women-owned and controlled small business concerns. The goal is not less than 5 % of the total value of all prime and subcontracts awards each fiscal year.¹⁴

2. Status as an economically disadvantaged women-owned small business (EDWOSB) or WOSB concern is determined in accordance with [13 CFR part 127](#). FAR 19.1503(a). EDWOSB and WOSB status protests are handled similar to HUBZone status protests, discussed *supra*, p. 22. FAR 19.308.
3. **Set-Asides for EDWOSBs and WOSBs.** The contracting officer may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to EDWOSB or WOSB concerns eligible under the WOSB Program in those NAICS codes in which SBA has determined that women-owned small business concerns are underrepresented or substantially underrepresented in Federal procurement, as specified on SBA's Web site at <http://www.sba.gov/WOSB>. FAR 19.1505; [13 C.F.R. Part 127](#).
 - a. For requirements in NAICS codes designated by SBA as underrepresented, a contracting officer may restrict competition to EDWOSB concerns or qualified WOSBs if the contracting officer has a reasonable expectation that (1) two or more WOSB or EDWOSB concerns will submit offers; and (2) the award will be made at a fair and reasonable price. The dollar limitations on WOSB set-asides were removed in accordance with section 1697 of the 2013 National Defense Authorization Act. *See also* DPAP Class Deviation 2013-00013.
 - b. The contracting officer may make an award, if only one acceptable offer is received from a qualified EDWOSB or WOSB concern, but if no acceptable offers are received from an EDWOSB or WOSB concern, the set-aside shall be withdrawn and the requirement, if still valid, must be considered for set aside in accordance with 19.203 and subpart 19.5. FAR 19.1505(d),(f)
4. **Sole Source Awards Not Authorized.** There is no independent authority to make a sole source award to WOSBs or EDWOSB.

¹⁴ On 23 May 2000, President Clinton signed Executive Order 13,157, 65 Fed. Reg. 34,035 (2000), highlighting his commitment to expanding opportunities for Women Owned Small Businesses. The EO sets out several steps Executive Agencies should take to increase contracting opportunities.

IV. CHOOSING THE CORRECT SET ASIDE

- A. **The order of precedence controversy.** Recent Amendment to the FAR have settled a long-running controversy between all three branches of Government concerning the proper order of precedence for set-asides among small business socioeconomic concerns.
1. Previously, there was much confusion about the order of precedence among SB programs. This confusion arose out of the statutory language of the HUBZone statute, which provides that “a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price.” [15 U.S.C. 657a\(b\)\(2\)\(B\)](#).
 2. The GAO previously held that, if there was a reasonable expectation that two or more HUBZones would perform the contract at a fair market value, then the HUBZone statute’s mandatory language *required* agencies to use a HUBZone set-aside prior to considering a SDVOSB or 8(a) set-aside. [International Program Group, Inc.](#), Comp. Gen. B-400278; B-400308, Sept. 19, 2008; [Mission Critical Solutions](#), Comp. Gen. B-401057, May 4, 2009.
 3. On 10 July 09, the Office of Management and Budget issued a memorandum to the heads of all Executive Branch agencies and departments stating that pending a legal analysis of the GAO’s basis for its recent decisions, they were to follow the SBA’s regulations which call for parity between the HUBZone, 8(a) and SDVOSB programs. [OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB MEMO. NO. 09-23, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES \(2009\)](#). On 21 August 09, the Department of Justice (DoJ) issued a memorandum directing Executive Branch agencies to follow the SBA regulations, finding that they are reasonable and binding, and reminding agencies that GAO decisions are not binding on the Executive Branch. [OFFICE OF THE DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, MEMORANDUM OPINION FOR SARA LIPSCOMB \(2009\)](#).
 4. The COFC eventually sided with the GAO holding that the plain language of the HUBZone statute required the use of HUBZone contracting when the requirements were met, and rejecting DoJ’s (and SBA’s) parity arguments. See [Mission Critical Solutions v. United States](#), 91 Fed. Cl. 386 (2010) (providing a thorough description of the controversy between the executive, legislative (GAO) and judiciary concerning the order of precedence for set-asides between the various small-business socioeconomic concerns).

- B. **Congress steps in.** On March 16, 2011, the FAR Council issued implementing Section 1347 of the [Small Business Jobs Act of 2010](#) (Pub. L. 111-240), clarifying that there is no order of precedence among the HUBZone, 8(a) and SDVOSB programs.
- C. ***There is no longer any order of precedence.*** After an additional amendment to the FAR to incorporate the WOSB program, FAR 19.203 now states, unequivocally, that “there is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15).”
- D. **Contracting Officer’s Discretion.** This change to the FAR allows contracting officers to freely choose among available SB socioeconomic concerns when determining whether to set-aside an acquisition, provided the relevant criteria is met (as outlined above).

V. COMPETITION ISSUES

- A. **Contract Bundling.** FAR 7.107; DFARS 207.170; 15 U.S.C. § 657q; 13 C.F.R. § 125.2
 - 1. Contract bundling is the practice of combining two or more procurement requirements, which were previously provided or performed under separate smaller contracts, into a solicitation for a *single contract* that is likely to be unsuitable for award to a small business due to:
 - a. The diversity, size, or specialized nature of the elements of the performance specified;
 - b. The aggregate dollar value of the anticipated award;
 - c. The geographical dispersion of the contract performance sites; or
 - d. Any combination of the factors described above;

[15 U.S.C. § 632\(o\)\(2\)](#); FAR 2.101; [13 C.F.R. § 125.2\(d\)](#); [USA Info. Sys., Inc.](#), B-291417, Dec. 30, 2002, 2002 CPD ¶ 224.
 - 2. A “separate smaller contract” means a contract that has been performed by one or more small business concerns or that was *suitable for award* to one or more small business concerns. FAR 2.101.
 - 3. The bundling rules apply to multiple awards of IDIQ contracts and to Federal Supply Schedule orders. A “single contract” includes indefinite-

quantity contracts and any *order* placed against an indefinite quantity contract. FAR 2.101.

4. **Bundling is not *per se* prohibited.** In fact, bundling may provide substantial benefits to the Government. However, because of the potential negative impact on small business participation, the “head of the agency *must* conduct market research to determine whether bundling is **necessary and justified.**” Market research may indicate that bundling is necessary and justified if an agency or the government would derive “**measurably substantial benefits.**” FAR 7.107(a).
5. The DOD has restricted bundling when the total cost of the contract exceeds \$6 million unless the acquisition strategy includes:
 - a. Results of market research;
 - b. Identification of any alternative contract approach that would involved a lesser degree of consolidation; and
 - c. Determination by the senior procurement executive that consolidation is necessary and justified. This determination must be included in the contract file. DFARS 207.170-3.
 - d. The 2013 NDAA, Pub. L. 103-355, repealed the former consolidation statute, 10 U.S.C. 2382, which was implemented by DFARS 207.170. However, the DFARS provision has not been repealed or amended at this time. Thus, we currently have two different definitions of consolidation; until the FAR/DAR councils resolve this, we must operate under both of them to the extent possible, giving priority to the statute if there is a conflict.
6. In addition, the SBA has tried to reign in bundled contracts. [See 13 C.F.R. § 125.2 \(2013\).](#)
7. Key parts of the rules on contract bundling. [13 C.F.R. § 125.2](#); FAR 7.107; FAR 2.101.
 - a. Permits “teaming” among two or more small firms, who may then submit an offer on a bundled contract.
 - b. Requires the agency to submit to the SBA for review any statement of work containing bundled requirements. If the SBA concludes that the bundled requirements are too large, it may appeal to the agency. [See e.g., Phoenix Scientific Corp., B-286817, Feb. 24, 2001, 2001 CPD ¶ 24.](#)
 - c. In determining “measurably substantial benefits” for the purpose of assessing whether bundling is “necessary and justified,” the agency

should look to the following factors: cost savings or price reduction, quality improvements, reduction in the acquisition cycle, better terms or conditions, or other benefits. An agency may find a bundled requirement “necessary and justified” if it will derive more benefit from bundling than from not bundling. See [TRIS Research](#), B-290644, Sept. 13, 2002, 2002 CPD ¶ 159.

- d. Per FAR 7.107, an agency may determine that bundling is “necessary and justified” if, as compared to the benefits that it would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits from:
 - (1) Benefits equivalent to 10% if the contract value (including options) is \$94 million or less; or
 - (2) Benefits equivalent to 5% or \$9.4 million, whichever is greater, if the contract value (including options) is over \$94 million.
 - e. Reducing only administrative or personnel costs does not justify bundling unless those costs are expected to be at least 10 percent of the estimated contract (including options) of the bundled requirements. FAR 7.107(d)
 - f. FAR 7.104(d)(2) requires acquisition planning to prevent “**substantial bundling**” if estimated contract order exceeds \$8 million (DoD); \$6 million (NASA, GSA, DOE); and \$2.5 million for all other agencies.
 - g. Bundling rules do NOT apply to contracts awarded and performed entirely outside the United States.
8. Notification of bundling of DoD contracts. DFARS 205.205-70
- a. When a proposed acquisition is funded entirely using DoD funds and potentially involves bundling, the contracting officer shall, **at least 30 days prior to the release of a solicitation or 30 days prior to placing an order without a solicitation**, publish in FedBizOpps.gov a notification of the intent to bundle the requirement.
 - b. In addition, if the agency has determined that measurably substantial benefits are expected to be derived as a result of bundling, the notification **shall** include a brief description of those benefits.
 - c. This requirement is in addition to the notification requirements concerning bundling at FAR 10.001(c)(2)(i) and (ii).

9. Reference. In October 2007, the Office of Small Business Programs released a [benefit analysis guidebook](#) that assists DoD acquisition teams considering contract bundling.

B. Tiered / Cascading Set-Asides

1. “Tiered” or “cascading set-asides” are set-asides where the contracting officer informs prospective offerors that he/she will award the contract to only certain socio-economic status offerors so long as two or more responsible offers are received from such offerors. On the other hand, if two or more such offers are not received, then the contracting officer will then award the contract to the next “tier” of socio-economic status offerors so long as two or more responsible offers are received from such offerors. If no tier has two such offers, then the contracting officer will award the contract on the basis of full and open competition. [Carriage Abstract, Inc.](#), B-290676, B-290676.2, Aug. 15, 2002, 2002 CPD ¶ 148.
2. Problems:
 - a. Abdicates government’s market research responsibilities.
 - b. Places too much market research and risk on contractors who may spend bid and proposal preparation cost, and yet never have their offer considered if the competition never makes it to their tier.¹⁵
3. Statutory Solution
 - a. Section 816 of the 2006 National Defense Authorization Act provides that:
 - (1) The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts.
 - (2) Elements.--The guidance prescribed under subsection (a) shall include a prohibition on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for

¹⁵ Some industry groups say cascading set aside acquisitions are unfair because in such acquisitions, contracting officers may never consider offers from bigger companies. One industry representative explained, "You spend all this bid and proposal money and you thought you had a chance of winning, and, oops, there was a HUBZone," said Cathy Garman, senior vice president of public policy at the Contract Services Association. Ms. Garman said that if she operated a medium or large business, she would not present an offer on a solicitation advertising a cascading set aside. *New Acquisition Strategy Alarms Industry*, June 29, 2005, Government Executive, at <http://www.govexec.com>.

a task or delivery order under a contract **unless** the contracting officer—

- (a) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations;
- (b) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; and
- (c) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.

b. DFARS implemented the Act via amendments to DFARS 202.101, 210.001, 213.106-1-70, 215.203-70, 219.1102 and 219.1307. See 71 Fed. Reg. 53042.

C. Multiple Award Contracts.

- 1. Small business set asides also apply to IDIQ contracts. Regardless of whether the overall contract was restricted, a KO may set aside a task/delivery order for small business concerns. FAR 19.504-4.
- 2. This implements Sec. 1331 of Public Law 111-240.

VI. THE RANDOLPH-SHEPPARD ACT

A. REFERENCES

- 1. The Randolph-Sheppard Act for the Blind (RSA) 20 U.S.C. §§ 107-107f.
- 2. U.S. DEPT. OF DEFENSE, INSTRUCTION 1125.03, VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL PROPERTY (2009) [hereinafter DODI 1125.03].
- 3. 34 C.F.R. Part 395, Vending Facility Program for the Blind on Federal Property (Department of Education).

4. Gaydos, *The Randolph-Sheppard Act: A Trap for the Unwary Judge Advocate*, ARMY LAW. Feb. 1984, at 21.

B. History of the Randolph-Sheppard Act for the Blind

1. The Current RSA—Generally

- a. Purpose. The purpose of the Randolph-Sheppard Act is to “provide blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting.” Specifically, under this act, “blind persons [are] licensed ...to operate vending facilities on any Federal property.” [20 U.S.C. § 107\(a\)](#)
- b. Preferences for the blind. The statute gives a preference for “blind vendors licensed by a State agency” in the “operation of vending facilities on Federal property...wherever feasible.” [20 U.S.C. § 107\(a\)](#).

2. Original Act. Act of June 20, 1936, Pub. L. No. 732, 49 Stat. 1559.

- a. The purpose of the Act was for federal agencies to give blind vendors the authorization to operate in federal buildings.
- b. The Act gave agency heads the discretion to exclude blind vendors from their building if the vending stands could not be properly and satisfactorily operated by blind persons.
- c. Location of the stand, type of stand and issuing the license were all subject to approval of the federal agency in charge of the building.
- d. Office of Education, Department of Interior, was designated to administer the program, and could designate state commissions or agencies to perform licensing functions. Department of Education Regulations appear to take precedence over other agency regulations in the event of a conflict. [61 Fed. Reg. 4,629, February 7, 1996](#).

3. The 1954 Amendments. Act of Aug. 3, 1954, Pub. L. No. 565m, 68 Stat. 663 (1954).

- a. The invention of vending machines served as an impetus to re-examine the Act. The amendments also showed concern for expanding the opportunities of the blind.

- b. The amendments made three main changes to the act:
 - (1) The vending program was changed from federal *buildings* to federal *properties*. “Federal property” was defined as “any building, land, or other real property owned, leased, or occupied by any department, agency or instrumentality of the United States...including the Department of Defense.” This definition is also the current definition. The Act applies to all federal activities—whether appropriated or nonappropriated.
 - (2) Agencies were required to give blind persons a preference, “wherever feasible,” when deciding who could operate vending stands on federal property.
 - (3) This preference was protected by requiring agencies to write regulations assuring the preference.
- c. The “wherever feasible” language still gave agencies wide discretion in administering the Act, and in reality, fell far short of Congressional intent to expand the blind vending program.

4. The 1974 Amendments. Act of Dec 7, 1974, Pub. L. No. 516, 88 Stat. 1623 (1974).

- a. Impetus—the proliferation of automatic vending machines and lack of enthusiasm for the Act by federal agencies.
- b. Comptroller General study showcased the abuses and ineffectiveness of the Act. Review of Vending Operations on Federally Controlled Property, Comp. Gen. Rpt. No. B-176886 (Sept. 27, 1973).

C. Current Act

- 1. The current RSA imposes several substantive and procedural controls. Key definitions are included in the regulations issued pursuant to the Act.¹⁶ The Act mandated three main substantive provisions:

¹⁶ Key Definitions.

- a. Blind person: a person whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses as determined by a physician or optometrist. 20 U.S.C. § 107e.
- b. Blind Licensee: a blind person licensed by the state licensing agency to operate a vending facility on federal property. 34 C.F.R. 395.1.
- c. License: a written instrument issued by the state licensing agency, to a blind person, authorizing that person to operate a vending facility on Federal property. 34 C.F.R. 395.1.
- d. State licensing agency: the state agency designated by the U.S. Secretary of Education to issue licenses to blind persons for the operation of vending facilities on Federal property. 34 C.F.R. 395.1.

- a. Give blind vendors priority on federal property for the operation of “vending facilities” so long as the blind vendor has been issued a “license” by the state licensing agency and in DOD, the blind vendor’s state licensing agency has been issued a “permit” (See definitions in footnote);
 - b. New buildings to include satisfactory sites for blind vendors; and
 - c. Require paying some vending machine income to the blind.
2. Priority Given to Blind Vendors
- a. In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency. [20 U.S.C. § 107\(b\)](#).
 - b. The Secretary of Education, the Commissioner of Rehabilitative Services Administration, and the federal agencies shall prescribe regulations which assure priority.
 - c. **“Vending facilities”** has a very broad definition and includes automatic vending machines, cafeterias, snack bars, cart services, shelters, counters, and such other appropriate auxiliary equipment...[which is]...necessary for the sale of articles or services...and which may be operated by blind licensees.” [20 U.S.C. § 107e\(7\)](#).
 - (1) Vending facilities typically sell newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises, and include the vending or exchange of chances for any State lottery. [20 U.S.C. § 107a\(a\)\(5\)](#) [32 C.F.R. § 395.1\(x\)](#). See, e.g., Conduct on the Pentagon Reservation, 32 C.F.R. Parts 40b and 234, para. 234.16, exempting sale of lottery tickets by Randolph-Sheppard vending facilities from the general prohibition of gambling.
 - (2) Vending machines (a type of “vending facility”) are defined as a “coin or currency operated machine that dispense articles or services, except that machines providing services of a recreational nature (e.g. jukeboxes, pinball machines, electronic game machines, pool tables, shuffle boards, etc.) and telephones are not considered to be vending machines.” [DODI 1125.03, encl 1, para E1.1.17](#).

e. Permit: the official written approval to establish and operate a vending facility request by and issued to a state licensing agency by the Head of a DOD Component. DODI 1125.3, encl 1, para.E1.1.11.

- (3) The blind vendor may only receive these preferences under the RSA regarding vending facilities if the State Licensing Agency (SLA) issues the blind vendor a “license.” **Additionally, in DoD, the SLA must seek out and apply for a permit to operate on a DoD installation.** The DOD installation has no affirmative obligation until the DOD Component issues a permit to the SLA. Once issued, the blind vendor has priority unless the interests of the U.S. are adversely affected. [DODI 1125.03, encl 2.](#)

D. Arbitration Procedures

1. Arbitration procedures. Two roads to arbitration:
 - a. Grievances of Blind Licensee. A dissatisfied blind licensee may submit a request to the SLA for a full evidentiary hearing on any action arising from the operation or administration of the vending facility program. [20 U.S.C. § 107d-1](#). If the blind licensee is dissatisfied with the decision made by the SLA, the vendor may file a complaint with the Secretary of Education who shall convene a panel to arbitrate the dispute; this decision is final and binding on the parties, except that appeal may be made under the Administrative Procedure Act.
 - b. Complaints by the SLA. SLA may file a complaint with the Secretary of Education if it determines that the agency is failing to comply with the Randolph-Sheppard Act or its implementing regulations. Upon filing of such a complaint the Secretary convenes a panel to arbitrate. The panel’s decision is final and binding on the parties, except that appeal may be made under the Administrative Procedure Act. [20 U.S.C. § 107d-1\(b\)](#) and [20 U.S.C. § 107d-2\(a\)](#). **NOTE:** The arbitration procedures do not provide the blind vendors with a cause of action against any agency. The blind vendors have an avenue to complain of wrongs by the SLA. The SLA has a forum to complain against a federal agency, which it believes is in violation of the act.

E. Protests to the Government Accountability Office (GAO)

1. Relationship to the Small Business Act’s 8(a) Provisions. The *requirements of the Randolph-Sheppard Act take precedence over the 8(a) program.* [Triple P. Services, Inc., Recon.](#), B-250465.8, December 30, 1993, 93-2 CPD ¶ 347 (denying challenge to agency’s decision to withdraw and 8(a) set aside and to proceed under the Randolph-Sheppard Act). But see [Intermark](#), B-290925, Oct. 23, 2002 (holding that the Army improperly withdrew a small-business set-aside solicitation for food services at Fort Rucker and reissued a solicitation on a full and open

competition basis allowing for RSA businesses to compete. GAO sustained incumbent small business contractor's protest stating there was no proper basis for withdrawing the small business set aside. GAO recommended that the agency's acquisition include both small businesses and the SLA using a "cascading" set of priorities whereby competition is limited to small business concerns and the SLA, with the SLA receiving award if its proposal is found to be within the competitive range).

2. Protest by State Licensing Agency (on behalf of blind vendors). The GAO will not normally consider a protest lodged by an SLA, because binding arbitration is the appropriate statutory remedy for the SLA. [Washington State Department of Services for the Blind](#), B-293698.2, Apr. 27, 2004 (dismissing a protest filed by the SLA stating that the RSA "vests exclusive authority with the Secretary [of Education] regarding complaints by SLAs concerning a federal agency's compliance with the Act, including challenges to agency decisions to reject proposals in response to a solicitation"); [Mississippi State Department of Rehabilitation Services](#), B-250783.8, Sept. 7, 1994 (unpub).

F. Controversial Issues

1. Burger King and McDonald's restaurants on military installations. [60 Fed. Reg. 4406](#), January 23, 1995. An arbitration panel convened in 1991 under the RSA decided that AAFES Burger King and the Navy's McDonald's franchise agreements violated two provisions of the Randolph-Sheppard Act.
 - a. DoD failed to notify state licensing agencies of its intention to solicit bids for vending facilities (i.e. Burger King and McDonalds), and
 - b. DoD's solicitation for nationally franchised fast food restaurants constituted a limitation on the placement or operation of a vending facility. DoD violated the Randolph-Sheppard Act by failing to seek the Secretary of Education's approval for such limitation.
 - c. Arbitration Panel's remedy:
 - (1) AAFES must contact the SLA in each state with a Burger King facility to establish a procedure acceptable to the SLA for identifying, training, and installing blind vendors as managers of all current and future Burger King operations. Additionally, DoD should give the SLA 120 days written notice of any new Burger King operations.
 - (2) Navy Resale and Services Support Office (NAVRESSO) will provide the appropriate SLA with 120 days notice of any new McDonald's facility to be established on a Navy

installation. The SLA must determine whether it wishes to exercise its priority and to provide funds to build and operate a new McDonald's facility. [60 Fed. Reg. 4406](#), January 23, 1995. See also [Randolph-Sheppard Vendors of America v. Weinberger](#), 795 F.2d 90 (Fed. Cir. 1986). SLA sued protesting contracts between AAFES and Burger King, and the Navy Exchange Service and McDonald's. The court remanded to the District Court with an order to dismiss, because the SLA had failed to exhaust administrative remedies.

G. Applicability to Military Mess Hall Contracts

1. The Government Accountability Office has determined that the Randolph-Sheppard Act applies to military dining facilities. In doing so, the GAO focused on the regulatory definition of "cafeteria." In addition the GAO gave significant weight to the regulatory interpretation of the Department of Education and to interpretations by certain high level officials within DOD. [Department of the Air Force—Reconsideration](#), B-250465.6, June 4, 1993, 93-1 CPD ¶ 431. See also [Intermark](#), B-290925, Oct. 23, 2002 (GAO sustained protest by offeror in Army dining facility contract where Army applied RSA preference). The applicability of the Randolph-Sheppard Act to mess halls remains a topic of considerable debate.
2. In [NISH v. Cohen](#), 247 F.3d 197 (4th Cir. 2001), the Fourth Circuit affirmed a District Court holding that the Act applied to military "mess hall services." Court relied heavily on the DoD position that Randolph-Sheppard applies.
3. [In Automated Comm'n Sys., Inc. v. United States](#), 49 Fed. Cl. 570 (2001), the Court of Federal Claims (COFC) refused to hear a challenge to the validity of DOD Directive 1125.03, which mandates the RSA preference for DOD dining facility contracts. COFC concluded that only federal district courts may hear a challenge to the validity of procurement statutes and regulations under their federal question and declaratory judgment authorities. COFC also held that the more specific RSA preference takes precedence over less-specific statutes, specifically, the HUBZone preference.

VII. THE BUY AMERICAN ACT (BAA)

A. Origin and Purpose

[41 U.S.C. §§ 8302-8305](#) (1995); Executive Order 10582 (1954), as amended by Executive Order 12608 (1987). FAR Part 25. The Act was passed during the Depression of the 1930s and was designed to save and create jobs for American workers.

B. Domestic Preference

Preference for Domestic End Products and Domestic Construction Materials.
FAR 25.001.

1. As a general rule, under the BAA, agencies may acquire only domestic end products. Unless another law or regulation prohibits the purchase of foreign end items, however, the contracting officer may not reject as nonresponsive an offer of such items.
2. The prohibition against the purchase of foreign goods does not apply if: the product is not available in sufficient commercial quantities; domestic preference would be inconsistent with the public interest; the product is for use outside the United States; the cost of the domestic product would be unreasonable; or the product is for commissary resale. The Trade Agreements Act and the North American Free Trade Agreement may also provide exceptions to the Buy American Act. The prohibition also does not apply to contracts procuring supplies where the contract value is under the micro-purchase threshold. FAR 25.100.

C. Definitions and Applicability

1. Manufactured domestic end products (FAR 25.003) are those articles, materials, and supplies acquired for public use under the contract that are:
 - a. Manufactured in the United States. [General Kinetics, Inc., Cryptek Div.](#), B-242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445 (“manufacture” means completion of the article in the form required for use by the government); [A. Hirsh, Inc.](#), B-237466, Feb. 28, 1990, 69 Comp. Gen. 307, 90-1 CPD ¶ 247 (manufacturing occurs when material undergoes a substantial change).
2. Comprised of “substantially all” domestic components (cost of components mined, produced or manufactured in the U.S. must exceed 50% of the cost of all components). For DOD, the components may be domestic or qualifying country components. [See DFARS 252.225-7001](#).
3. An *unmanufactured* domestic end product must be mined or produced in the United States. FAR 25.003. Geography determines the origin of an unmanufactured end product. [41 U.S.C. § 10a](#) and §10b.
4. The nationality of the company that manufactures an end item is irrelevant. [Military Optic, Inc.](#), B-245010.3, Jan. 16, 1992, 92-1 CPD ¶ 78. What is relevant under the BAA is whether an item is manufactured, mined or produced in the U.S. FAR 25.001.

5. **Components** are articles, materials and supplies incorporated directly into the end product. FAR 25.003. [Orlite Eng'g Co.](#), B-229615, Mar. 23, 1988, 88-1 CPD ¶ 300; [Yohar Supply Co.](#), B-225480, Feb. 11, 1987, 66 Comp. Gen. 251, 87-1 CPD ¶ 152.
- a. Parts are not components, and their origin is not considered in this evaluation. [Hamilton Watch Co.](#), B-179939, June 6, 1974, 74-1 CPD ¶ 306.
 - b. A “component” under the BAA is either entirely foreign or entirely domestic. A component is domestic only if it is manufactured in the United States. [Computer Hut Int'l, Inc.](#), B-249421, Nov. 23, 1992, 92-2 CPD ¶ 364.
 - c. A foreign-made component may become domestic if it undergoes substantial remanufacturing in the United States. [General Kinetics, Inc. Cryptek Div.](#), B-242052.2, May 7, 1991, 70 Comp. Gen. 473, 91-1 CPD ¶ 445.
 - d. **Material** that undergoes manufacturing is not a “component” if the material is so transformed that it loses its original identity. See [Orlite Eng'g](#) and [Yohar Supply Co.](#), *supra*.
 - e. The cost of components includes transportation costs to the place of incorporation into the end product, and any applicable duty. FAR 25.101; DFARS 252.225-7001(a)(5)(ii). Component costs do **NOT** include:
 - (1) Packaging costs, [S.F. Durst & Co.](#), B-160627, 46 Comp. Gen. 784 (1967);
 - (2) The cost of testing after manufacture, [Patterson Pump Co.](#), B-200165, Dec. 31, 1980, 80-2 CPD ¶ 453; [Bell Helicopter Textron](#), B-195268, 59 Comp. Gen. 158 (1979); or
 - (3) The cost of combining components into an end product, [To the Secretary of the Interior](#), B-123891, 35 Comp. Gen. 7 (1955).
6. Qualifying country end products/components
- a. DoD does not apply the restrictions of the BAA when acquiring equipment or supplies that are mined, produced, or manufactured in “qualifying countries.” Qualifying countries are countries with which we have reciprocal defense agreements. They are enumerated in [DFARS 225.872-1\(a\)](#).

- b. A manufactured, qualifying country end product must contain over 50 % (by cost) components mined, produced, or manufactured in the qualifying country or the United States. [DFARS 252.225-7009\(a\)\(7\)](#).
- c. Qualifying country items thus receive a “double benefit” under the BAA. First, qualifying country components may be incorporated into a product manufactured in the United States to become a domestic end product. Second, products manufactured by a qualifying country are exempt from the BAA.

D. Certification Requirement

- 1. A contractor certifies by its offer that each end product is domestic and/or indicates which end products are foreign. FAR 52.225-2; [DFARS 252.225-7006](#).
- 2. The contracting officer may rely on the offeror’s certification that its product is domestic, unless, prior to award, the contracting officer has reason to question the certification. [New York Elevator Co.](#), B-250992, Mar. 3, 1993, 93-1 CPD ¶ 196 (construction materials); [Barcode Indus.](#), B-240173. Oct. 16, 1990, 90-2 CPD ¶ 299; [American Instr. Corp.](#), B-239997, Oct. 12, 1990, 90-2 CPD ¶ 287. See also, [Klinge Corp. v. United States and Sea Box, Inc.](#), No. 08-134C, slip op. at 15 (Fed. Cl. June 10, 2008) (applied to TAA certification).

E. Exceptions to the Buy American Act

As a general rule, the Buy American Act does not apply in the following situations:

- 1. The contract is procuring supplies, where the contract value is under the micro-purchase threshold. FAR 25.100.
- 2. The required products are not available in sufficient commercial quantities. FAR 25.103(b). For a list of items determined to be “unavailable,” See FAR 25.104. See also [Midwest Dynamometer & Eng’g Co.](#), B-252168, May 24, 1993, 93-1 CPD ¶ 408.
- 3. The agency head (or designee) determines that domestic preference is inconsistent with the public interest. FAR 25.103(a). DoD has determined that it is inconsistent with the public interest to apply the BAA to qualifying countries. [Technical Sys. Inc.](#), B-225143, Mar. 3, 1987, 66 Comp. Gen. 297, 87-1 CPD ¶ 240.
- 4. The Trade Agreements Act (TAA) authorizes the purchase. [19 U.S.C. §§ 2501-82](#); FAR 25.4; [Olympic Container Corp.](#), B-250403, Jan. 29,

1993, 93-1 CPD ¶ 89; [Becton Dickinson AcuteCare](#), B-238942, July 20, 1990, 90-2 CPD ¶ 55; [IBM Corp.](#), GSBCA No. 10532-P, 90-2 BCA ¶ 22,824.

- a. If the TAA applies to the purchase, only domestic products, products from **designated** foreign countries, qualifying country products, and products which, though comprised of over 50% foreign components, are “substantially transformed” in the United States or a designated country, are eligible for award. See [Compuadd Corp. v. Dep’t of the Air Force](#), GSBCA No. 12021-P, 93-2 BCA ¶ 25,811 (“manufacturing” standard of the BAA is less stringent than “substantial transformation” required under TAA); [Hung Myung \(USA\) Ltd.](#), B-244686, Nov. 7, 1991, 71 Comp. Gen. 64, 91-2 CPD ¶ 434; [TLT-Babcock, Inc.](#), B-244423, Sept. 13, 1991, 91-2 CPD ¶ 242.
 - (1) To be a substantial transformation there must be a new and different end product. For instance, attaching handles to a pot would not be sufficient. Ralph C. Nash, *INTERPRETING THE TRADE AGREEMENTS ACT: Conflicting Decisions* 22 No. 8 Nash & Cibinic Rep. 45, 2008.
 - b. The TAA applies only if the estimated cost of an acquisition equals or exceeds the threshold set by the U.S. Trade Representative.
 - c. The TAA does **not** apply to DOD unless the DFARS lists the product, **even** if the threshold is met. See [DFARS 225.401-70](#). If the TAA does not apply, the acquisition is subject to the BAA. See, e.g., [Hung Myung \(USA\) Ltd.](#), B-244686, Nov. 7, 1991, 91-2 CPD ¶ 434; [General Kinetics, Inc. Cryptek Div.](#), B-242052.2, May 7, 1991, 91-1 CPD ¶ 445.
 - d. Because of the component test, the definition of “domestic end product” under the BAA is more restrictive than the definition of “U.S. made end product” under the TAA. Thus, for DoD, if an offeror submits a U.S. made end product, the BAA evaluation factor still may apply.
5. The North American Free Trade Agreement (NAFTA) Implementation Act authorizes the purchase. [Pub. L. No. 103-182, 107 Stat. 2057](#) (1993); FAR 25.402. Note, however, that NAFTA does not apply to DOD procurements unless the DFARS lists the product. See [DFARS 225.401-70](#).
 6. The Caribbean Basin Economic Recovery Act authorizes the purchase. [19 U.S.C. §§ 2701-05](#); FAR 25.400.

7. The product is for use outside the United States. Note: under the Balance of Payments Program, an agency must buy domestic even if the end item is to be used overseas. A number of exceptions allow purchase of foreign products under this program. If both domestic and foreign products are offered, and if the low domestic price exceeds the low foreign price by more than 50%, the contracting officer must buy the foreign item. FAR Subpart 25.3; [DFARS Subpart 225.3](#).
8. The cost of the domestic product is unreasonable. FAR 25.105; [DFARS 225.103\(c\)](#); FAR 225.5. Although cost reasonableness normally is a preaward determination, an agency may also make this determination after award. [John C. Grimberg Co. v. United States](#), 869 F.2d 1475 (Fed. Cir. 1989).
 - a. Civilian agencies
 - (1) If an offer of a non-domestic product is low and a large business offers the lowest-priced, domestic product, increase the non-domestic product by 6%.
 - (2) If an offer of a non-domestic product is low and a small business offers the lowest-priced, domestic product, increase the non-domestic product by 12%.
 - b. DoD agencies increase offers of non-domestic, non-qualifying country products by 50%, regardless of the size of the business that offers the lowest-priced, domestic end product. Under the DFARS, if application of the differential does not result in award on a domestic product, disregard the differential and evaluate offers at face value. [DFARS 225.502](#).
 - c. Do not apply the evaluation factor to post-delivery services such as installation, testing, and training. [Dynatest Consulting, Inc.](#), B-257822.4, Mar. 1, 1995, 95-1 CPD ¶ 167.
 - d. In a negotiated procurement, agencies may award to a firm offering a technically superior but higher priced non-domestic, non-qualifying country product. [STD Research Corp.](#), B-252073.2, May 24, 1993, 93-1 CPD ¶ 406.
9. Resale. The contracting officer may purchase foreign end project specifically for commissary resale. FAR 25.103.

F. Construction Materials

[41 U.S.C. § 8303](#); FAR Subpart 25.2.

1. This portion of the BAA applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.
2. The Act requires construction contractors to use only domestic construction materials for construction contracts performed in the United States.
3. “Construction material” is an article, material, or supply rough to the construction site by a contractor or subcontractor for incorporation into the building or work. FAR 25.003.
4. Exceptions. This restriction does not apply if:
 - a. The cost would be unreasonable, as determined by the head of agency;
 - b. The agency head (or delegee) determines that use of a particular domestic construction material would be impracticable; or,
 - c. The material is not available in sufficient commercial quantities. See FAR 25.103.
5. Application of the restriction. The restriction applies to the material in the form that the contractor brings it to the construction site. See [S.J. Amoroso Constr. Co. v. United States](#), 26 Cl. Ct. 759 (1992), aff’d, 12 F.3d 1072 (Fed. Cir. 1993); [Mauldin-Dorfmeier Constr., Inc.](#), ASBCA No. 43633, 93-2 BCA ¶ 25,790 (board distinguishes “components” from “construction materials”); [Mid-American Elevator Co.](#), B-237282, Jan. 29, 1990, 90-1 CPD ¶ 125.
6. Post-Award Exceptions
 - a. Contractors may formally request waiver of the BAA, however, normally, the contractor must request such a waiver prior to contract award. [C. Sanchez & Son v. United States](#), 6 F.3d 1539 (Fed. Cir. 1993) (contractor failed to formally request waiver of BAA; claim for equitable adjustment for supplying domestic wire denied).
 - b. Failure to grant a request for waiver may be an abuse of discretion. [John C. Grimberg Co. v. United States](#), 869 F.2d 1475 (Fed. Cir. 1989) (contracting officer abused discretion by denying post-award request for waiver of BAA, where price of domestic materials exceeded price of foreign materials plus differential).
7. The DOD qualifying country source provisions do *not* apply to construction materials. [DFARS 225.872-2\(b\)](#).

G. Remedies for Buy American Act Violations

1. If the agency head finds a violation of the Buy American Act— Construction Materials, the findings and the name of the contractor are made public. The contracting officer may had contractual actions against the offender, including, but not limited to termination for default and suspension/debarment. FAR 25.206.
2. Termination of the contract for default is proper if the contractor's product does not contain over 50% (by cost) domestic or qualifying country components. [H&R Machinists Co.](#), ASBCA No. 38440, 91-1 BCA ¶ 23,373.
3. A contractor is not entitled to an equitable adjustment for providing domestic end items if required by the BAA. [Valentec Wells, Inc.](#), ASBCA No. 41659, 91-3 BCA ¶ 24,168; [LaCoste Builders, Inc.](#), ASBCA No. 29884, 88-1 BCA ¶ 20,360; [C. Sanchez & Son v. United States](#), *supra*.

H. The Berry Amendment

[10 U.S.C. § 2533a](#). The “Berry Amendment” is an industrial protectionist law that requires DOD to buy certain listed items only from domestic sources. The statute is more draconian in its requirements than the Buy American Act because the Berry Amendment contains fewer exceptions.

1. The Berry Amendment requires DOD to procure the following items that are “grown, reprocessed, reused, or produced” in the U.S.: food; clothing, and material components, thereof; tents, cotton and other natural fiber products, canvas, or wool; specialty metals (located at [10 U.S.C. § 2533b](#)); and hand and measuring tools.
2. The Beret Saga. *See* 43 The Gov't Contractor 18 at ¶ 191 (Associate Professor Stephen L. Schooner, George Washington University Law School, and Judge Advocate (USAR retired), discussing the purchase of berets).
3. Result of beret saga: Berry Amendment amended so that only Service Secretaries and the Under Secretary of Defense for Acquisition, Technology, and Logistics have Berry Amendment waiver authority. The Berry Amendment “does not apply to the extent that the Secretary of Defense or the Secretary of the military department covered determines that satisfactory and sufficient quantity of any such article or item...cannot be procured as and when needed at United States market prices.” 10 U.S.C. § 2533a(c)

4. The National Defense Authorization Act of 2007 added section § 2533b, to title 10.¹⁷
 - a. Entitled “Requirement to buy strategic materials critical to national security from American sources; exceptions,” these provisions were deleted from § 2533a and placed in § 2533b to address specialty metals. The new section provides that appropriated funds may not be used to purchase the following end items, *or components thereof*, containing specialty metal not melted or produced in the United States: aircraft; missile and space systems; ships; tank and automotive items; weapon systems; ammunition; or specialty metals themselves that are purchased by DOD or a prime DOD contractor.¹⁸
 - b. The law provides exceptions for some purchases including: procurements of commercially available electronic components whose specialty metal content is *de minimis* compared to the value of the overall item; procurements under the simplified acquisition threshold; procurements outside the United States in support of combat or contingency operations; procurements where purchase under other than competitive procedures has been approved for urgent and compelling urgency; and procurements where the Secretary of Defense or a military department determines that “compliant specialty metal of satisfactory quality and sufficient quantity, and in the required form, cannot be procured as and when needed.”¹⁹

¹⁷ *Id.*

¹⁸ *Id.* (emph. added). The Act defines “specialty metals” to include steel, nickel, iron-nickel, cobalt based alloys, titanium, and zirconium. *Id.* U.S. Dep’t of Defense, Defense Federal Acquisition Reg. Supp. 225-7003) also contains certain restrictions on the use of proper specialty metals on DOD contracts.

¹⁹ National Defense Authorization Act for FY 2007, § 842, Pub. L. 364, 120 Stat. § 2083 (2006).