



# Legislative and Regulatory Developments Affecting Small Businesses

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Formerly a partner at an international law firm, Devon Hewitt has over 20 years' experience in representing small, mid-tier and large government contractors. She has participated in over 100 bid protests and is one of the few attorneys to have appeared before GAO in formal hearings and argued bid protest appeals before the United States Court of Appeals for the Federal Circuit. Ms. Hewitt has particular expertise in small business contracting matters and currently serves on the Board of the Small Emerging Contractors Advisory Forum and on the Board of the Washington Chapter of the SDVOSB Council. Ms. Hewitt is a graduate of Smith College and the University of Virginia School of Law. Ms. Hewitt clerked for the Honorable Jose Fuste in the U.S. District Court for Puerto Rico.

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# Recent Developments

- SBA Proposed Rules
  - ✓ Small Business Government Contracting and NDAA FY 2013 Amendments, issued December 29, 2014, 79 Fed. Reg. 77955, comments due April 6 (extended)
  - ✓ Small Business Mentor Protégé Program/Misc., issued February 5, 2015, 80 Fed. Reg. 6618, comments due April 6
- FY 2015 National Defense Authorization Act
- FY 2016 National Defense Authorization Act

# SBA Proposed FY 2013 NDAA Rule

- **Limitations on Subcontracting**
- Subcontracting Plans
- **Identity of Interest Affiliation**
- **Small Business Joint Ventures**
- Calculation of Annual Receipts
- **NAICS Appeals**
- Nonmanufacturer Rule
- 8(a) Adverse Impact/Construction
- Certificate of Competency/IDIQ

# SBA Proposed FY 2013 NDAA Rule cont.

- Limitations on Subcontracting
  - ✓ Applies to all types of small businesses and set-asides
  - ✓ Does not apply to small business set asides under SAT
  - ✓ LOS percentages now apply to the “amount paid by the government to the prime”
    - Does not apply to “similarly situated entities”
    - Applies at all subcontracting tiers
  - ✓ Penalties for noncompliance
    - Compliance determined by base period/each option period
    - POP for each order, unless small business competition

# SBA Proposed FY 2013 NDAA Rule cont.

- Identity of Interest Affiliation
  - ✓ Rebuttable presumption of affiliation for firms that conduct business with each other and are owned and controlled by persons who are **married, parties to a civil union, parents and children, and siblings**
  - ✓ Rebuttable presumption of affiliation (economic dependence) if a firm derives **70% or more** of its revenue from another firm in the previous fiscal year

# SBA Proposed FY 2013 NDAA Rule cont.

- Small Business Joint Ventures
  - ✓ Joint ventures made up of small businesses are exempt from affiliation provided each concern is “small” under the size standard applicable to the procurement
  - **Removed requirement that procurement be a certain size/value**



# SBA Proposed FY 2013 NDAA Rule cont.

- NAICS Appeals
  - ✓ SBA seeking comment on timeline for filing a NAICS appeal
    - Currently 10 calendar days after issuance of solicitation
  - ✓ SBA seeking comment on affect of NAICS appeal on procurement
    - Currently CO must stay the solicitation
    - Should CO also delay the offer or bid response date?

# SBA Proposed SB M-P Program/Misc.

- New Small Business Mentor-Protégé Program
- Definition of Joint Venture
- HUBZone Joint Ventures
- Joint Venture Paperwork
- Applications for Small Business Mentor-Protégé Program
- Mentors
- Protégés
- Other Agency Mentor-Protégé Programs
- Small Business Mentor-Protégé exemption from affiliation
- Requirements for Written Mentor-Protégé Agreement
- Changes to 8(a) Program
- Applications for HUBZone certification
- OHA Appeals

## SBA Proposed SB M-P Program/Misc. cont.

- New Small Business Mentor-Protégé Program
  - ✓ Will be in addition to existing 8(a) M-P Program
  - ✓ Applies to all small businesses other than 8(a) concerns
  - ✓ SBA will verify concern applying for participation in program is “small” (no self-certification)
  - ✓ Two separate tracks for applications but may be consolidated into one office for review
  - ✓ May institute “open” and “closed” application periods

## SBA Proposed SB M-P Program/Misc. cont.

- Other Agency M-P Programs
  - ✓ Other agencies or departments (except DoD) cannot continue agency or department specific Mentor-Protégé program unless plan for program is submitted to and approved by SBA
  - ✓ Agency may operate existing Mentor-Protégé program for one year following SBA's issuance of final rules for small business Mentor-Protégé program
  - ✓ SBA requests comments on whether there will be a continuing need for other agency Mentor-Protégé programs such as VA's program
  - ✓ SBA requests comments on whether its small business Mentor-Protégé Program should include subcontracting incentives authorized by other agency Mentor-Protégé programs
  - ✓ Written agreement must identify other M-P relationships and show how assistance provided is different

# SBA Proposed SB M-P Program/Misc. cont.

- Mentors
  - ✓ Non-profit entities cannot be mentors in *either* the 8(a) or small business Mentor-Protégé programs
  - ✓ A Mentor in either the small business or 8(a) M-P may have a total of 3 protégés, spread among the two programs
  - ✓ Mentors may own up to 40% equity interest in protégés but should that end following termination of M-P relationship?
- Protégés
  - ✓ SBA proposes to eliminate the restrictions on the types of small businesses that can participate in both the 8(a) and small business Mentor-Protégé programs
    - Concern would qualify regardless of its size relative to its primary NAICS code
    - Concern would qualify at any stage of program participation
    - Concern would qualify as protégé even though it had already won a small business or 8(a) contract

## SBA Proposed SB M-P Program/Misc. cont.

- Joint Ventures
  - ✓ Joint Venture must be writing
  - ✓ Can be a partnership (informal) or separate legal entity (formal)
    - SBA seeks comments on whether it should require joint ventures to be separate legal entities
  - ✓ Separate legal entity joint venture cannot have its own employees; eliminates “populated” joint venture option
  - ✓ Permits HUBZone to joint venture with another small business or large business under small business Mentor-Protégé program
  - ✓ Joint Venture established between small business and its mentor under the small business Mentor-Protégé program will be deemed small for any contract or subcontract

# SBA Proposed SB M-P Program/Misc. cont.

- 8(a) Program
  - ✓ SBA proposes to require additional evidence to demonstrate social disadvantage
    - ✓ Applicant must show both discriminatory conduct and how conduct affected individual's entry into or advancement in the business world
  - ✓ Additional requirements and obligations when changing primary NAICS code
  - ✓ Program participation may be suspended (1) where principal office located in "major disaster area" or (2) a lapse in federal appropriations adversely affects a concern's ability to be awarded one or more 8(a) contracts
  - ✓ Clarifies that OHA must uphold 8(a) determination even if the decision is of "less than ideal clarity"

# Legislative Initiatives

- National Defense Authorization Act for FY 2015
  - ✓ Transfer control of VA's SDVOSB verification program to SBA (NO)
  - ✓ Increase Government small business contracting goal from 23% to 25% (NO)
  - ✓ Authorizes sole source awards to WOSBs of up to \$4 million (\$6 million for manufacturing contracts) (YES)
    - **Eliminated option for self-certification**



# Legislative Initiatives cont.

- National Defense Authorization Act for FY 2016
  - ✓ House Small Business Committee plans to report out series of bills to attach to the FY 2016 NDAA
    - Small Contractors Improve Competition Act (“SCICA”) of 2015 (H.R. 1481)
      - Require SBA to focus more on small business participation and subcontracting
      - Bundling and Consolidation
      - **Joint Venture and Teaming Arrangements**
      - Reverse Auctions



Questions?