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# Column: SBA To Enact Significant Rule Changes Before 2020

By Samuel S. Finnerty, associate, PilieroMazza PLLC

On Nov. 29, the Small Business Administration issued a final rule that will implement several provisions of the National Defense Authorization Acts of 2016 and 2017 and of the "RISE Act" of 2015, as well as other clarifying amendments. As we outlined nearly a year ago when the rule was first proposed, these changes address key small business issues for government contractors, including: subcontracting plans, the non-manufacturer rule (NMR); Information Technology Value-Added Resellers (ITVARs); limitations on subcontracting, recertification, size determinations and the ostensible subcontractor rule. Below, we summarize fundamental revisions, which take effect on Dec. 30, 2019.

## Subcontracting Plans

Consistent with the 2017 NDAA, the rule provides that it will be a material breach of contract when a contractor or subcontractor fails to comply in good faith with its subcontracting plan requirements, including failing to provide reports and/or cooperate in studies or surveys to determine the extent of compliance. The rule provides a number of examples of what constitutes a failure to make good faith efforts, including, among others, (1) failing to timely submit subcontracting reports and (2) failing to pay small business subcontractors in accordance with the terms of the contract. SBA states that those examples are not intended to be inclusive and other factors may be considered. The rule also provides that failure to make a good-faith effort may be considered in any past performance evaluation of the contractor.

The rule also requires other-than-small prime contractors with commercial subcontracting plans to include indirect costs in their subcontracting goals.

## Small Business Disaster Contracting

As provided in the RISE Act, SBA is establishing contracting preferences for small business concerns located in disaster areas and will provide agencies with double credit for awards to such concerns. SBA will use the existing Federal Acquisition Regulation definitions to provide that an agency will receive

credit for an "emergency response contract" awarded to a "local firm" that qualifies as an SBC under the applicable size standard for a "major disaster or emergency area." According to the Rule, a concern is "located in a disaster area," if, during the last 12 months, it had its main operating office in the area and that office generated at least half of the firm's gross revenues and employed at least half of the firm's permanent employees. The rule provides a number of factors that SBA will consider if the firm does not meet the foregoing criteria in order to determine whether the firm resides or primarily does business in a disaster area.

## NMR & ITVAR Procurements

The rule amends the NMR to expressly state that a firm may qualify as an SBC to provide manufactured products or other supply items as a nonmanufacturer if, among other things, it does not exceed 500 employees (or 150 employees for the ITVAR exception to NAICS Code 541519 at §121.201, footnote 18). According to SBA, because contractors under the ITVAR exception are non-manufacturers, it would make no sense for SBA to retain a 150-employee size standard if concerns could also qualify under the NMR 500-employee size standard.

## Set-Asides Within a Set-Aside

The Rule provides contracting officers the authority to set aside orders for a socio-economic small business program (e.g., 8(a), HUBZone, SDVO, WOSB) under a multiple award contract (MAC) awarded as a generic small business set-aside. This is significant because although SBA has considered implementing such a rule in the past, it has chosen not to, in part because it was concerned that such a rule would unfairly deprive SBCs of an opportunity to compete for orders issued under their MACs. Comments regarding this change were split, with those in opposition claiming that such a rule:

--Is unfair to the original small business awardee of the MAC;  
--Will reduce competition for future

task orders; and  
--Will discourage SBCs from bidding on MACs in the future.

SBA believes these concerns are eased because the rule will only apply proactively and will not affect already awarded MACs (unless socio-economic set-asides were contemplated thereunder). More specifically, according to SBA, going forward, small businesses will know at the time of offer what kind of set-asides, if any, are available at the time of award and on future orders. Notably, however, the text of the rule does not require a procuring agency to inform offerors whether it plans to make socio-economic set-asides down the road. Thus, it is unclear how this rule addresses the concerns raised by the opposition.

## Size Recertification

SBA is clarifying that recertification is required on full-and-open contracts when such contracts are awarded to SBCs. In addition, the rule adds language to SBA's 8(a) regulations to require recertification under 8(a) contracts. Similar language can be found in SBA's SDVOSB, HUBZone, and WOSB/EDWOSB[1] regulations, but had been missing from its 8(a) regulations.

Moreover, the rule provides that, if a prime contractor relies on a similarly situated subcontractor to meet the applicable performance requirements—and the similarly situated subcontractor has to recertify—the prime cannot count the subcontractor towards its performance requirements if the subcontractor recertifies as an entity other than that for which it previously certified. Interestingly, however, the rule does not impose recertification requirements on the subcontractor, as the duty to recertify generally applies to prime contractors only. As such, it is unclear how this requirement will be administered.

This rule was adopted as proposed despite the fact that 25 of the 32 comments received opposed the change and noted that the "requirement would be overly burdensome and would add 'complexities to an already difficult compliance system.'"

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# Event Calendar

## DECEMBER 2019

- 17 **NCAIED hosts Native Edge Institute**, Washington, DC <https://bit.ly/34FFIHm>  
17 **HHS Vendor Outreach--Veterans Only**, Washington, DC <https://bit.ly/2WiEOb4>  
17 **DOJ OSDDBU Vendor Outreach**, Washington, DC <https://bit.ly/2neUPBE>  
19 **DHS Vendor Outreach Session**, Washington, DC <https://bit.ly/2nYBi8L>

## JANUARY 2020

- 9 **Defense Tech hosts Multi-Agency Federal Government Procurement and Tech Plus Expo**, Washington, DC <https://sites.google.com/site/defensetechexpo/DCFederaleXpo>  
14 **HHS Vendor Outreach**, Washington, DC <https://bit.ly/2WiEOb4>  
15 **DOL Vendor Outreach**, Washington, DC <https://bit.ly/2nk7Zx6>  
23 **DHS Vendor Outreach Session**, Washington, DC <https://bit.ly/2nYBi8L>  
23 **Potomac Officers Club hosts CIO Forum**, Falls Church, VA <https://bit.ly/2nTjuvY>  
23 **How to do Business with the US Navy/USMC**, Washington, DC <https://bit.ly/2W9tePK>  
28 **GovConectx Winter Showcase**, Alexandria, VA <https://bit.ly/2DPgfub>  
30-31 **US Defense Leadership Forum hosts 2020 Air Force Contracting Summit**, Miramar Beach, FL <https://www.defenseleadershipforum.org/>

## FEBRUARY 2020

- 11 **HHS Vendor Outreach**, Washington, DC <https://bit.ly/2WiEOb4>

## Column: SBA rule

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### Limitations on Subcontracting (LOS)

The rule implements a number of revisions. First, in response to public comment regarding a proposed revision that sought to clarify when an independent contractor can be counted as an employee for size and LOS purposes (a rule which commentators thought was confusing and unnecessarily difficult to comply with), SBA revised its LOS regulation to clarify that contractors should simply apply the analysis in 13 C.F.R. §121.106(a) (i.e., SBA's rule regarding how it calculates a concern's number of employees) to determine whether independent contractors are employees or subcontractors. And, in situations where the independent contractor is a subcontractor—its work will count toward meeting the applicable LOS if it is a similarly situated

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[bit.ly/2WiEOb4](https://bit.ly/2WiEOb4)

11-13 **National 8(a) Association hosts 2020 Small Business Conference**, New Orleans, LA <https://www.national8aassociation.org/>

27 **DHS Vendor Outreach**, Washington, DC <https://bit.ly/2nYBi8L>

## MARCH 2020

- 2-5 **SAVE THE DATE: RES 2020 Reservation Economic Summit**, Las Vegas, NV <https://bit.ly/2NvYeXU>  
10 **HHS Vendor Outreach**, Washington, DC <https://bit.ly/2WiEOb4>  
17 **DHS Vendor Outreach--WOSBs only**, Washington, DC <https://bit.ly/2nYBi8L>

## APRIL 2020

- 14 **HHS Vendor Outreach**, Washington, DC <https://bit.ly/2WiEOb4>  
14-16 **GSA hosts Federal Acquisition Service Training conference**, Atlanta, GA <https://www.gsa.gov/FAST>  
15 **DOL OSDDBU hosts Vendor Outreach**, Washington, DC <https://bit.ly/2nk7Zx6>  
20-21 **US Defense Leadership Forum hosts 2020 Southwest Defense Contracting Summit**, San Antonio, TX [defenseleadershipforum.org/](https://defenseleadershipforum.org/)

## MAY 2020

- 12 **HHS Vendor Outreach**, Washington, DC <https://bit.ly/2WiEOb4>  
15 **Montgomery County Chamber of Commerce hosts GovConNet Pathway to Growth Procurement Conference**, Rockville, MD <https://bit.ly/2Jjg7WM>  
21 **DHS Vendor Outreach--HUBZone only**, Washington, DC <https://bit.ly/2nYBi8L>  
26-28 **NVSBBC hosts 10th Annual Veteran Entrepreneur Training Symposium (VETS '20)** San Antonio, TX  
28 **Alliance and NJIT PTAC hosts 4th Annual Supply Chain Matchmaking Conference**, Newark, NJ <https://bit.ly/2MleDYq>

## JUNE 2020

- 9 **HHS hosts Vendor Outreach**, Washington, DC <https://bit.ly/2WiEOb4>  
25 **DHS Vendor Outreach**, Washington, DC <https://bit.ly/2nYBi8L>  
29-30 **Defense Leadership Forum hosts Navy Contracting Summit**, Norfolk, VA <https://www.defenseleadershipforum.org/>

## JULY 2020

- 14 **HHS Vendor Outreach**, Washington, DC <https://bit.ly/2WiEOb4>  
15 **DOL Vendor Outreach**, Washington, DC <https://bit.ly/2nk7Zx6>  
23 **DHS Vendor Outreach**, Washington, DC <https://bit.ly/2nYBi8L>

## AUGUST 2020

- 11 **HHS Vendor Outreach**, Washington, DC <https://bit.ly/2WiEOb4>  
27 **DHS Vendor Outreach--8(a) and SDB only**, Washington, DC <https://bit.ly/2nYBi8L>

## SEPTEMBER 2020

21-23 **NAWBO hosts National Womens Business Conference**, Austin, TX <https://bit.ly/2pRZmeP>

## OCTOBER 2020

- 15 **DOL Vendor Outreach**, Washington, DC <https://bit.ly/2nk7Zx6>

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entity. In other words, if the individual at issue is not an employee for size purposes, work performed by that individual must be considered a subcontract for LOS purposes.

Second, SBA is adding language to the LOS regulation to clarify that contracting officers may request information from contractors regarding LOS compliance and that evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

Lastly, in a welcome development, SBA is creating several exclusions from calculating LOS compliance where there are no small business providers, such as airline travel, cloud computing services, mass media purchases, or work performed by a transportation or disposal entity for a contract assigned under the environmental remediation NAICS code 562910. According to SBA, this list is not meant to be exhaustive. It allows a small business in another industry in a similar situation to the four categories above to also demonstrate that certain direct costs should be excluded because they are not the principal purpose of the acquisition, and small business concerns do not provide the service.

### **Ostensible Subcontractor**

SBA is amending its regulations to allow an unsuccessful offeror, SBA, or a contracting officer to file a size or status protest regarding a socio-economic set-aside or sole-source award to a prime contractor that is unduly reliant on a small, but not similarly situated subcontractor or where the small, non-similarly situated subcontractor is performing the primary and vital requirements of the contract (commonly referred to as ostensible subcontractor affiliation).

This is significant, as SBA's regulations have never provided such bases to protest. And, the allowance for a status protest is particularly significant. Indeed, it is possible that even if a prime contractor and its small (but not similarly situated) subcontractor are affiliated under the ostensible subcontractor rule as the result of a size protest, the prime contractor may still qualify as a small business and, therefore, remain eligible for the award. Thus, by providing for an ostensible

subcontractor status protest in such a scenario, SBA has created a basis for such awardees to be deemed ineligible for award. Of further note, the rule specifies that SBA will not find that a prime contractor is unduly reliant on one or more non-similarly situated subcontractors where the prime contractor can demonstrate that it, together with any similarly situated entity, will meet the LOS.

Finally, in response to a public comment recommending a comparable change with respect to SBA's rules regarding protests of SDVO eligibility for contracts awarded by the Dept. of Veterans Affairs, SBA is adding a rule that authorizes a protest challenging whether a prime contractor is unusually reliant on a subcontractor that is not Center for Verification and Evaluation verified, or a protest alleging that such subcontractor is performing the primary and vital requirements of a VA procurement contract.

### **Size Determinations**

SBA is also amending 13 C.F.R. §121.404(a) to make it clear that size is generally determined at the time of initial offer or response including price—and not when other formal responses are received after the initial offer, such as final proposal revisions. Furthermore, SBA is adding a paragraph to the foregoing regulation to articulate an exception to this general rule. Namely, when an agency awards a MAC that does not require offers for the contract to include price, size will be determined on the date of initial offer for the contract, which may not include price.

### **NMR and Kit Assembly**

SBA is also removing the kit assembler exception to the NMR. Instead, SBA will apply the multiple-item rule, stating that if the majority of the items in a kit are made by a small business, no waiver of the NMR is required.

### **Other Changes**

The rule addresses a few other topics such as posting notice of substantial bundling, subcontracting compliance reviews, procurement center representative reviews, and set-asides where one offer is received.

*Samuel S. Finnerty is a member of PilieroMazza PLLC's Government Contracts, Small Business Programs & Advisory Services, and Government Contracts Claims and Appeals practice groups. This column was reprinted with permission from PilieroMazza.*

## Teaming Opportunities

**EITC Corporation** is seeking subcontractors to do work on-site at Ft. Belvoir, with experience in Forcepoint and/or other Securonix software, and at Ft. Meade with experience in backend (Hadoop, Linux, AWS, Accumulo and Elastic), frontend (Java, Spring, Hibernate, JavaScript, HTML 5) and analytics (Scala, Spark and MapReduce). Contact John Eubank at 443-717-2100 or email [jeubank@eitccorp.com](mailto:jeubank@eitccorp.com).

**Serrato Corp. dba Blue Ridge Job Corps** located in Marion, Virginia is looking for a small business subcontractor to repair the combination walk-in freezer and cooler located in the centers cafeteria. NAICS 811412. Closing date is 8 am EST on Jan. 8. Ref. SOL-01-2020-13. Contact Mike Blankenship at 276-781-5019 or [blankenship.michael@jobcorps.org](mailto:blankenship.michael@jobcorps.org).

**Rocky Top Solutions** is seeking subcontracting opportunities in the fields of mobile development, web development, analytics, search engine optimization, and general software development. NAICS 541511. Area of operations is AZ, CA, FL, GA, HI, NC, SC, TN, WV and VI. Contact Corey Walker at 919-228-8662 or email [corey.walker@rockytopsolutions.com](mailto:corey.walker@rockytopsolutions.com).

**Walsh Group** seeks small business specialty trades subcontractors for the VA Spinal Cord Injury and Community Living Center Building and Parking Structure in San Diego, CA. NAICS 238xxx and related industries. Ref. W912PL-20-R-0004 | TC19018. Closing date is 2 pm CST on Jan. 17. Contact Charles Rodriguez at 312-563-5400.

**PTSI Managed Services Inc (Parsons)** seeks small business subs to provide material and supplies associated with guy wire replacement project. Material includes helical anchors, extensions, guy adapters, guy cable, and miscellaneous guy hardware. Project magnitude is \$100k-250k. Places of performance are spread over AK, CA, HI, IL, KS, TN, VT, WA and KY. NAICS 332312 and related codes. Ref. SOL-ACE-2875. Closing is 3 pm EST on Jan. 6. Contact Judy Upchurch at [judy.ctr.upchurch@faa.gov](mailto:judy.ctr.upchurch@faa.gov).