

# Hands on NAICS Codes

February 9, 2022

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## Federal Government Achieves Small Business Contracting Goal for Sixth Consecutive Year with Record-Breaking \$120 Billion to Small Businesses

*Eight Federal Agencies Receive A+ Rating on FY2018 Small Business Federal Procurement Scorecard*

**Release Date:** Tuesday, June 25, 2019

**Release Number:** 19-36

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**WASHINGTON** – Today, the [U.S. Small Business Administration](#) announced that the federal government exceeded its small business federal contracting goal for the sixth consecutive year, awarding 25.05 percent in federal contract dollars to small businesses totaling \$120.8 billion, an increase from the previous fiscal year of nearly \$15 billion. The [Fiscal Year 2018 Small Business Federal Procurement Scorecard](#) marks the first time more than \$120 billion in prime contracts has been awarded to small businesses. Overall, the federal government earned an “A” on this year’s [government-wide scorecard](#).

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# WHY DOES THE NAICS SYSTEM MATTER?

# Why does the NAICS System Matter?

- “SBA's size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for ‘small business’ concerns.” - 13 C.F.R. § 121.101(a)

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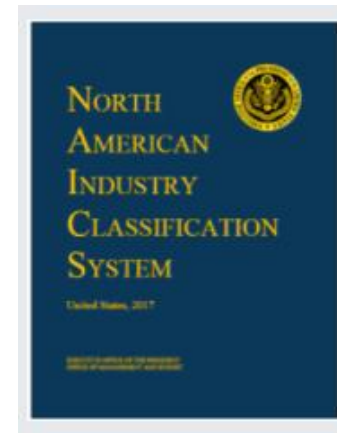
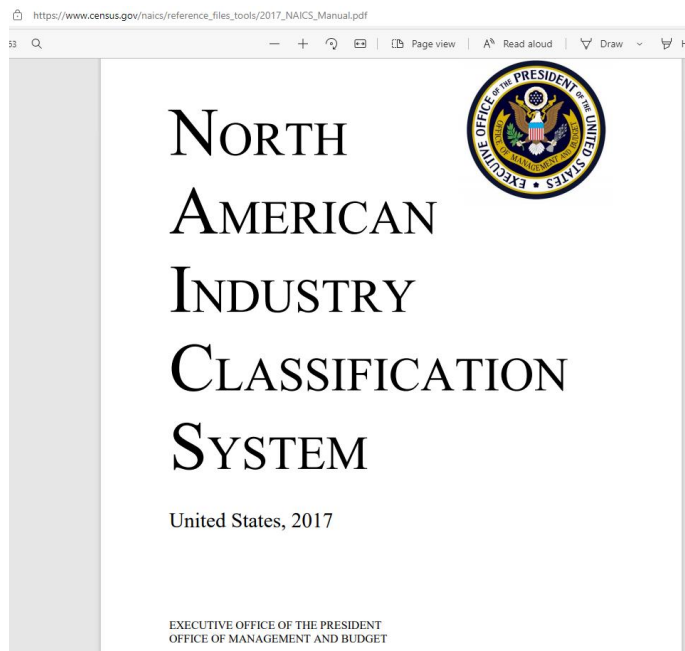
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# WHAT IS THE NAICS SYSTEM?

# What is the NAICS System?

- “NAICS is described in the North American Industry Classification Manual-United States” - 13 C.F.R. § 121.101(b)



# What is the NAICS System?

- The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.
- NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 to replace the Standard Industrial Classification (SIC) system. It was developed jointly by the U.S. Economic Classification Policy Committee (ECPC), Statistics Canada, and Mexico's Instituto Nacional de Estadística y Geografía, to allow for a high level of comparability in business statistics among the North American countries.



# What is the NAICS System?

- Sector
  - Subsector
    - Industry Group
      - NAICS Industry
        - National Industry

# What is the NAICS System?

- 54 Professional, Scientific, and Technical Services
  - 541 Professional, Scientific, and Technical Services
    - 5411 Legal Services
      - 54119 Other Legal Services
        - 541191 Title Abstract and Settlement Offices

# What is the NAICS System?

- “12” – “Sector”
  - There are 20 Sectors in the system
- “123” – “Subsector”
- “1234” – “Industry Group”
- “12345” – “NAICS Industry”
- “123456” – “National Industry”
- “Primary industry classification” means the six-digit NAICS code designation that best describes the primary business activity of the 8(a) BD applicant or Participant. - 13 C.F.R. § 124.3

# What is the NAICS System?

- Sectors:
  - 11 Agriculture, Forestry, Fishing and Hunting
  - 21 Mining, Quarrying, and Oil and Gas Extraction
  - 22 Utilities
  - 23 Construction
  - 31-33 Manufacturing
  - 42 Wholesale Trade
  - 44-45 Retail Trade
  - 48-49 Transportation and Warehousing

# What is the NAICS System?

- Sectors, cont.:
  - 51 Information
  - 52 Finance and Insurance
  - 53 Real Estate and Rental and Leasing
  - 54 Professional, Scientific, and Technical Services
  - 55 Management of Companies and Enterprises
  - 56 Administrative and Support and Waste Management and Remediation Services
  - 61 Educational Services
  - 62 Health Care and Social Assistance

# What is the NAICS System?

- Sectors, cont.:
  - 71 Arts, Entertainment, and Recreation
  - 72 Accommodation and Food Services
  - 81 Other Services (except Public Administration)
  - 92 Public Administration

# What is the NAICS System?

- Which NAICS codes really matter in Government contracting?
  - 23 Construction
  - 31-33 Manufacturing
  - 54 Professional, Scientific, and Technical Services

# HOW DOES IT WORK IN GOVERNMENT CONTRACTING?



# How does it Work in Government Contracting?

## §121.201 What size standards has SBA identified by North American Industry Classification System codes?

The size standards described in this section apply to all SBA programs unless otherwise specified in this part. The size standards themselves are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small.

### SMALL BUSINESS SIZE STANDARDS BY NAICS INDUSTRY

| NAICS codes   | NAICS U.S. industry title                         | Size standards in millions of dollars | Size standards in number of employees |
|---|---|---------------------------------------|---------------------------------------|
| <b>Sector 11—Agriculture, Forestry, Fishing and Hunting</b> |   |                                       |                                       |
| <b>Subsector 111—Crop Production</b>                        |   |                                       |                                       |
| 111110  | Soybean Farming                                   | \$1.0                                 |                                       |
| 111120  | Oilseed (except Soybean) Farming                  | \$1.0                                 |                                       |
| 111130  | Dry Pea and Bean Farming                          | \$1.0                                 |                                       |
| 111140  | Wheat Farming                                     | \$1.0                                 |                                       |
| 111150  | Corn Farming                                      | \$1.0                                 |                                       |
| 111160  | Rice Farming                                      | \$1.0                                 |                                       |
| 111191  | Oilseed and Grain Combination Farming             | \$1.0                                 |                                       |
| 111199  | All Other Grain Farming                           | \$1.0                                 |                                       |
| 111211  | Potato Farming                                    | \$1.0                                 |                                       |
| 111219  | Other Vegetable (except Potato) and Melon Farming | \$1.0                                 |                                       |
| 111310  | Orange Groves                                     | \$1.0                                 |                                       |
| 111320  | Citrus (except Orange) Groves                     | \$1.0                                 |                                       |
| 111331  | Apple Orchards                                    | \$1.0                                 |                                       |
| 111332  | Grape Vineyards                                   | \$1.0                                 |                                       |
| 111333  | Strawberry Farming                                | \$1.0                                 |                                       |

# How does it Work in Government Contracting?

- The SBA maintains a list of size standards:
  - “SBA considers economic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size. It also considers technological changes, competition from other industries, growth trends, historical activity within an industry, unique factors occurring in the industry which may distinguish small firms from other firms, and the objectives of its programs and the impact on those programs of different size standard levels.” - 13 C.F.R. § 121.102(a)
  - “As part of its review of a size standard, SBA will investigate if any concern at or below a particular standard would be dominant in the industry. SBA will take into consideration market share of a concern and other appropriate factors which may allow a concern to exercise a major controlling influence on a national basis in which a number of business concerns are engaged. Size standards seek to ensure that a concern that meets a specific size standard is not dominant in its field of operation.” - 13 C.F.R. § 121.102(b)
  - “As part of its review of size standards, SBA's Office of Size Standards will examine the impact of inflation on monetary-based size standards (e.g., receipts, net income, assets) at least once every five years and submit a report to the Administrator or designee. If SBA finds that inflation has significantly eroded the value of the monetary-based size standards, it will issue a proposed rule to increase size standards.” - 13 C.F.R. § 121.102(c)

# How does it Work in Government Contracting?

- Manufacturing vs. Services

| NAICS codes | NAICS U.S. industry title   | Size standards in millions of dollars | Size standards in number of employees |
|-------------|---|---------------------------------------|---------------------------------------|
| 333995      | Fluid Power Cylinder and Actuator Manufacturing                                       |                                       | 750                                   |
| 333996      | Fluid Power Pump and Motor Manufacturing  |                                       | 1,250                                 |
| 333997      | Scale and Balance Manufacturing   |                                       | 500                                   |
| 333999      | All Other Miscellaneous General Purpose Machinery Manufacturing                       |                                       | 500                                   |
| 334111      | Electronic Computer Manufacturing   |                                       | 1,250                                 |
| 334112      | Computer Storage Device Manufacturing   |                                       | 1,250                                 |
| 334118      | Computer Terminal and Other Computer Peripheral Equipment Manufacturing               |                                       | 1,000                                 |
| 334210      | Telephone Apparatus Manufacturing   |                                       | 1,250                                 |
| 334220      | Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing |                                       | 1,250                                 |
| 334290      | Other Communications Equipment Manufacturing  |                                       | 750                                   |
| 334310      | Audio and Video Equipment Manufacturing   |                                       | 750                                   |
| 334412      | Bare Printed Circuit Board Manufacturing  |                                       | 750                                   |
| 334413      | Semiconductor and Related Device Manufacturing  |                                       | 1,250                                 |
| 334416      | Capacitor, Resistor, Coil, Transformer, and Other Inductor Manufacturing              |                                       | 500                                   |
| 334417      | Electronic Connector Manufacturing  |                                       | 1,000                                 |
| .....       | Printed Circuit Assembly (Electronic)   |                                       | ---                                   |

| NAICS codes | NAICS U.S. industry title  | Size standards in millions of dollars | Size standards in number of employees |
|-------------|--|---------------------------------------|---------------------------------------|
| 621340      | Offices of Physical, Occupational and Speech Therapists and Audiologists | \$8.0                                 |                                       |
| 621391      | Offices of Podiatrists   | \$8.0                                 |                                       |
| 621399      | Offices of All Other Miscellaneous Health Practitioners                  | \$8.0                                 |                                       |
| 621410      | Family Planning Centers  | \$12.0                                |                                       |
| 621420      | Outpatient Mental Health and Substance Abuse Centers                     | \$16.5                                |                                       |
| 621491      | HMO Medical Centers  | \$35.0                                |                                       |
| 621492      | Kidney Dialysis Centers  | \$41.5                                |                                       |
| 621493      | Freestanding Ambulatory Surgical and Emergency Centers                   | \$16.5                                |                                       |
| 621498      | All Other Outpatient Care Centers  | \$22.0                                |                                       |
| 621511      | Medical Laboratories   | \$35.0                                |                                       |
| 621512      | Diagnostic Imaging Centers   | \$16.5                                |                                       |
| 621610      | Home Health Care Services  | \$16.5                                |                                       |
| 621910      | Ambulance Services   | \$16.5                                |                                       |
| 621991      | Blood and Organ Banks  | \$35.0                                |                                       |
| 621999      | All Other Miscellaneous Ambulatory Health Care Services                  | \$16.5                                |                                       |
| 622110      | General Medical and Surgical Hospitals                                   | \$41.5                                |                                       |
| 622210      | Psychiatric and Substance Abuse Hospitals                                | \$41.5                                |                                       |

# How does it Work in Government Contracting?

- Mixed Standards:

| NAICS codes    | NAICS U.S. industry title  | Size standards in millions of dollars | Size standards in number of employees |
|----------------|--|---------------------------------------|---------------------------------------|
| 541714         | Research and Technology in Biotechnology (except Nanobiotechnology) <sup>11</sup>  |                                       | 1,000 <sup>11</sup>                   |
| 541715         | Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology) <sup>11</sup> |                                       | 1,000 <sup>11</sup>                   |
| <i>Except,</i> | Aircraft, Aircraft Engine and Engine Parts <sup>11</sup>   |                                       | 1,500 <sup>11</sup>                   |
| <i>Except,</i> | Other Aircraft Parts and Auxiliary Equipment <sup>11</sup>   |                                       | 1,250 <sup>11</sup>                   |
| <i>Except,</i> | Guided Missiles and Space Vehicles, Their Propulsion Units and Propulsion Parts <sup>11</sup>                                    |                                       | 1,250 <sup>11</sup>                   |
| 541720         | Research and Development in the Social Sciences and Humanities   | \$22.0                                |                                       |
| 541810         | Advertising Agencies <sup>10</sup>   | \$16.5 <sup>10</sup>                  |                                       |

# How does it Work in Government Contracting?

- “[A] business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor.” - 13 C.F.R. § 121.105(a)(1)

# How does it Work in Government Contracting?

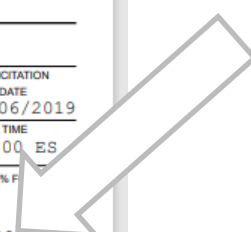
- “A concern must not exceed the size standard for the NAICS code specified in the solicitation. The contracting officer must specify the size standard in effect on the date the solicitation is issued. If SBA amends the size standard and it becomes effective before the date initial offers (including price) are due, the contracting officer may amend the solicitation and use the new size standard.” - 13 C.F.R. § 121.402(a)

# How does it Work in Government Contracting?

- “The procuring agency contracting officer, or authorized representative, designates the proper NAICS code and corresponding size standard in a solicitation, selecting the single NAICS code which best describes the principal purpose of the product or service being acquired. Except for multiple award contracts as set forth in paragraph (c) of this section, every solicitation, including a request for quotations, must contain only one NAICS code and only one corresponding size standard.
- (1) Primary consideration is given to the industry descriptions in the U.S. NAICS Manual, the product or service description in the solicitation and any attachments to it, the relative value and importance of the components of the procurement making up the end item being procured, and the function of the goods or services being purchased.
- (2) A procurement is generally classified according to the component which accounts for the greatest percentage of contract value. Acquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code, not under a Wholesale Trade or Retail Trade NAICS code. A concern that submits an offer or quote for a contract, order, or subcontract where the NAICS code assigned to the contract, order, or subcontract is one for supplies, and furnishes a product it did not itself manufacture or produce, is categorized as a nonmanufacturer and deemed small if it has 500 or fewer employees and meets the requirements of §121.406(b).” - 13 C.F.R. § 121.402(b)

# How does it Work in Government Contracting?

| SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS  |     |                         |                 | 1. REQUISITION NUMBER  |                        | PAGE OF                      |                                       |
|---|-----|-------------------------|-----------------|--|------------------------|------------------------------|---------------------------------------|
| OFFEROR TO COMPLETE BLOCKS 12, 17, 23, 24, & 30   |     |                         |                 |  |                        | 1 353                        |                                       |
| 2. CONTRACT NO.   |     | 3. AWARD/EFFECTIVE DATE | 4. ORDER NUMBER |  | 5. SOLICITATION NUMBER |                              | 6. SOLICITATION ISSUE DATE            |
|   |     |                         |                 |  | 70LGLY19BGLB00006      |                              | 08/06/2019                            |
| 7. FOR SOLICITATION INFORMATION CALL:   |     | a. NAME                 |                 | b. TELEPHONE NUMBER (No collect calls)   |                        | 8. OFFER DUE DATE/LOCAL TIME |                                       |
|   |     | Gretchen Lovell         |                 | 912-261-4039   |                        | 09/05/2019 1400 ES           |                                       |
| 9. ISSUED BY  |     |                         | CODE            | 10. THIS ACQUISITION IS  |                        |                              | SET ASIDE: 100.00 % F                 |
| DEPARTMENT OF HOMELAND SECURITY<br>FEDERAL LAW ENFORCEMENT TRNG CTR<br>1131 CHAPEL CROSSING RD<br>PRO BLDG 93<br>ATTN: GRETCHEN LOVELL<br>GLYNCO GA 31524 |     |                         | FLETC GL        | <input type="checkbox"/> UNRESTRICTED OR<br><input checked="" type="checkbox"/> SMALL BUSINESS<br><input checked="" type="checkbox"/> HUBZONE SMALL BUSINESS<br><input type="checkbox"/> SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS<br><input type="checkbox"/> WOMEN-OWNED SMALL BUSINESS (WOSB) ELIGIBLE UNDER THE WOMEN-OWNED SMALL BUSINESS PROGRAM<br><input type="checkbox"/> EDWOSB<br><input type="checkbox"/> 8(A) |                        |                              | NAICS: 561730<br>SIZE STANDARD: \$7.5 |
| 11. DELIVERY FOR FOB DESTINATION UNLESS BLOCK IS MARKED   |     | 12. DISCOUNT TERMS      |                 | 13a. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)  |                        | 13b. RATING                  |                                       |
| <input type="checkbox"/> SEE SCHEDULE   |     |                         |                 | <input type="checkbox"/>   |                        |                              |                                       |
| 15. DELIVER TO  |     |                         | CODE            | 16. ADMINISTERED BY  |                        |                              | CODE                                  |
| DEPARTMENT OF HOMELAND SECURITY<br>FEDERAL LAW ENFORCEMENT TRNG CTR<br>ATTN: GRETCHEN LOVELL<br>1131 CHAPEL CROSSING RD<br>GLYNCO GA 31525                |     |                         |                 | DEPARTMENT OF HOMELAND SECURITY<br>FEDERAL LAW ENFORCEMENT TRNG CTR<br>1131 CHAPEL CROSSING RD<br>PRO BLDG 93<br>ATTN: GRETCHEN LOVELL<br>GLYNCO GA 31524  |                        |                              | FLETC GL                              |
| 17a. CONTRACTOR/OFFEROR   |     | CODE                    | FACILITY CODE   | 18a. PAYMENT WILL BE MADE BY   |                        |                              |                                       |
|   |     |                         |                 |  |                        |                              |                                       |
| TELEPHONE NO.   |     |                         |                 | 17b. CHECK IF REMITTANCE IS DIFFERENT AND PUT SUCH ADDRESS IN OFFER  |                        |                              |                                       |
|   |     |                         |                 | <input type="checkbox"/> SEE ADDENDUM  |                        |                              |                                       |
| 19.   | 20. | 21.                     | 22.             | 23.  | 24.                    |                              |                                       |





# How does it Work in Government Contracting?

- “For a Multiple Award Contract, the contracting officer must:
  - (i) Assign the solicitation a single NAICS code and corresponding size standard which best describes the principal purpose of the acquisition as set forth in paragraph (b) of this section, only if the NAICS code will also best describe the principal purpose of each order to be placed under the Multiple Award Contract; or
  - (ii) Divide the solicitation into discrete categories (such as Contract Line Item Numbers (CLINs), Special Item Numbers (SINs), Sectors, Functional Areas (FAs), or the equivalent), and assign each discrete category the single NAICS code and corresponding size standard that best describes the principal purpose of the goods or services to be acquired under that category (CLIN, SIN, Sector, FA or equivalent) as set forth in paragraph (b) of this section. A concern must meet the applicable size standard for each category (CLIN, SIN, Sector, FA or equivalent) for which it seeks an award as a small business concern.” - 13 C.F.R. § 121.402(c)(1)

# How does it Work in Government Contracting?

- “(i) The contracting officer must assign a single NAICS code for each order issued against a Multiple Award Contract. The NAICS code assigned to an order must be a NAICS code included in the underlying Multiple Award Contract. When placing an order under a Multiple Award Contract with multiple NAICS codes, the contracting officer must assign the NAICS code and corresponding size standard that best describes the principal purpose of each order. In cases where an agency can issue an order against multiple SINs with different NAICS codes, the contracting officer must select the single NAICS code that best represents the acquisition. If the NAICS code corresponding to the principal purpose of the order is not contained in the underlying Multiple Award Contract, the contracting officer may not use the Multiple Award Contract to issue that order.
- (ii) With respect to an order issued against a multiple award contract, an agency will receive small business credit for goaling only if the business concern awarded the order has represented its status as small for the underlying multiple award contract for the same NAICS code as that assigned to the order, provided recertification has not been required or occurred for the contract or order.” - 13 C.F.R. § 121.402(c)(2)

# How does it Work in Government Contracting?

- “The NAICS code assigned to a procurement and its corresponding size standard is final unless timely appealed to SBA's Office of Hearings and Appeals (OHA), or unless SBA assigns an NAICS code or size standard as provided in paragraph (e) of this section. - 13 C.F.R. § 121.402(d)
- When a NAICS code designation or size standard in a solicitation is unclear, incomplete, missing, or prohibited, SBA may clarify, complete, or supply a NAICS code designation or size standard, as appropriate, in connection with a formal size determination or size appeal. - 13 C.F.R. § 121.402(e)
- Any offeror or other interested party adversely affected by an NAICS code designation or size standard designation may appeal the designations to OHA under part 134 of this chapter.” - 13 C.F.R. § 121.402(f)
- “Formal size determinations and NAICS code designations made by authorized SBA officials are binding upon the parties. Opinions otherwise provided by SBA officials to contracting officers or others are advisory in nature, and are not binding or appealable.” - 13 C.F.R. § 121.403

# How does it Work in Government Contracting?

- “Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.” - 13 C.F.R. § 121.103(a)(1)
- “A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract.” 13 C.F.R. § 121.103(h)(1)(i)
- “Two firms approved by SBA to be a mentor and protégé under §125.9 of this chapter may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of §124.513 (c) and (d), §125.8(b) and (c), §125.18(b)(2) and (3), §126.616(c) and (d), or §127.506(c) and (d) of this chapter, as appropriate.” - 13 C.F.R. § 121.103(h)(1)(ii)

# SPECIAL CASES

# Special Cases

- “A 8(a) BD applicant must be small for its primary industry at the time SBA certifies it for admission into the program.” - 13 C.F.R. § 121.602
- “An applicant concern must qualify as a small business concern as defined in part 121 of this title. The applicable size standard is the one for its primary industry classification.” - 13 C.F.R. § 124.102(a)(1)
- “In order to remain eligible to participate in the 8(a) BD program after certification, a firm must generally remain small for its primary industry classification, as adjusted during the program.” - 13 C.F.R. § 124.102(a)(2)

# Special Cases

- “At time of contract offer, an SDVO SBC must be small within the size standard corresponding to the NAICS code assigned to the contract.” - 13 C.F.R. § 125.14(a)
- “A HUBZone SBC must meet SBA's size standards for its primary industry classification as defined in §121.201 of this title.” - 13 C.F.R. § 126.203(a)
- “To qualify as an EDWOSB, a concern must be . . . [a] small business as defined in part 121 of this chapter for its primary industry classification; . . . .” - 13 C.F.R. § 127.200(a)
- “To qualify as a WOSB, a concern must be . . . [a] small business as defined in part 121 of this chapter; . . . .” - 13 C.F.R. § 127.200(b)
- “To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. As a recipient, you must apply current SBA business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts, including the primary industry classification of the applicant.” - 49 C.F.R. § 26.65(a)

# ISSUES



# Issues

- Size Protest:
  - A protest must be for a particular procurement
  - A protest must contain specific facts; mere allegations will not be enough to support a size protest
  - The following entities may file a size or status protest in connection with a particular procurement:
    - Any qualified offeror that the contracting officer has not eliminated from consideration for any procurement-related reason, such as non-responsiveness, technical unacceptability or outside of the competitive range
    - The contracting officer
    - SBA personnel

# Issues

- NAICS Code Challenge:
  - “A NAICS code designation made by a procuring activity contracting officer may be appealed to OHA. The procedures governing OHA appeals are set forth in part 134 of this chapter. The OHA appeal is an administrative remedy that must be exhausted before judicial review of a NAICS code designation may be sought in a court.” - 13 C.F.R. § 121.1102

# Issues

- NAICS Code Challenge, cont.:
  - “(1) Any interested party adversely affected by a NAICS code designation may appeal the designation to OHA. An interested party would include a business concern seeking to change the NAICS code designation in order to be considered a small business for the challenged procurement, regardless of whether the procurement is reserved for small businesses or unrestricted. The only exception is that, for a sole source contract reserved under SBA's 8(a) Business Development program (see part 124 of this chapter), only SBA's Associate Administrator for Business Development may appeal the NAICS code designation.
  - (2) A NAICS code appeal may include an appeal involving the applicable size standard, such as where more than one size standard corresponds to the selected NAICS code, or a question relating to the size standard in effect at the time the solicitation was issued or amended.” - 13 C.F.R. § 121.1103(a)

# Issues

- NAICS Code Challenge, cont.:
- “The contracting officer's determination of the applicable NAICS code is final unless appealed as follows:
  - (1) An appeal from a contracting officer's NAICS code or size standard designation must be served and filed within 10 calendar days after the issuance of the solicitation or amendment affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers are due. OHA will summarily dismiss an untimely NAICS code appeal.
  - (2)(i) The appeal petition must be in writing and must be sent to the Office of Hearings & Appeals, U.S. Small Business Administration, 409 3rd Street, SW., Suite 5900, Washington, DC 20416.
    - (ii) There is no required format for a NAICS code appeal, but an appeal must include the following information: the solicitation or contract number; the name, address, and telephone number of the contracting officer; a full and specific statement as to why the NAICS code designation is erroneous, and argument in support thereof; and the name, address and telephone number of the appellant or its attorney.
  - (3) The appellant must serve the appeal petition upon the contracting officer who assigned the NAICS code to the acquisition and SBA's Office of General Counsel, Associate General Counsel for Procurement Law, 409 3rd Street, SW., Washington, DC 20416.” - 13 C.F.R. § 121.1103(b)

# Issues

- NAICS Code Challenge, cont.:
  - “Procedure after a NAICS code appeal is filed and served. (1) Upon receipt of the service copy of a NAICS code appeal, the contracting officer shall:
    - (i) Stay the date for the closing of receipt of offers;
    - (ii) Advise the public, by amendment to the solicitation or other method, of the existence of the NAICS code appeal and the procedures and deadline for interested parties to file and serve arguments concerning the appeal;
    - (iii) Send a copy of (or an electronic link to) the entire solicitation, including amendments, to OHA;
    - (iv) File and serve any response to the appeal prior to the close of the record; and
    - (v) Inform OHA of any amendments, actions or developments concerning the procurement in question.
  - (2) Upon receipt of a NAICS code appeal, OHA shall:
    - (i) Notify the appellant, the contracting officer, the SBA and any other known party of the date OHA received the appeal and the date the record will close; and
    - (ii) Conduct the appeal in accordance with part 134 of this chapter.
  - (3) Any interested party may file and serve its response to the NAICS code appeal.” - 13 C.F.R. § 121.1103(c)

# Issues

- NAICS Code Standards:
  - “When SBA publishes a final rule in the Federal Register revising, modifying, or establishing a size standard, SBA will include in the final rule, an instruction that interested persons may file a petition for reconsideration of a revised, modified, or established size standard at SBA's Office of Hearings and Appeals (OHA) within 30 calendar days after publication of the final rule in accordance with 15 U.S.C. 632(a)(9) and part 134, subpart I of this chapter. The instruction will provide the mailing address, facsimile number, and email address of OHA.” - 13 C.F.R. § 121.102(e)
  - “Within 14 calendar days after a petition for reconsideration of a size standard is filed, unless it appears OHA will dismiss the petition for reconsideration, SBA will publish a document in the Federal Register announcing the size standard or standards that have been challenged, the Federal Register citation of the final rule, the assigned OHA docket number, and the date of the close of record. The document will further state that interested parties may contact OHA to intervene in the dispute pursuant to §134.906 of this chapter.” - 13 C.F.R. § 121.102(f)

# Issues

- Fraud:
  - “Presumption of Loss Based on the Total Amount Expended. In every contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, cooperative agreement, cooperative research and development agreement, or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation.” - 13 C.F.R. § 121.108(a)

# Issues

- Fraud, cont.:
  - “Deemed Certifications. The following actions shall be deemed affirmative, willful and intentional certifications of small business size and status:
    - (1) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.
    - (2) Submission of a bid, proposal, application or offer for a Federal grant, contract, subcontract, cooperative agreement or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.
    - (3) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement, as a small business concern.” - 13 C.F.R. § 121.108(b)



# Issues

- Fraud, cont.:
  - “Penalties for Misrepresentation. (1) Suspension or debarment. The SBA suspension and debarment official or the agency suspension and debarment official may suspend or debar a person or concern for misrepresenting a firm's size status pursuant to the procedures set forth in 48 CFR subpart 9.4.
  - (2) Civil Penalties. Persons or concerns are subject to severe penalties under the False Claims Act, 31 U.S.C. 3729-3733, the Program Fraud Civil Remedies Act, 31 U.S.C. 3801-3812 and any other applicable laws or regulations, including 13 CFR part 142.
  - (3) Criminal Penalties. Persons or concerns are subject to severe criminal penalties for knowingly misrepresenting the small business size status of a concern in connection with procurement programs pursuant to section 16(d) of the Small Business Act, 15 U.S.C. 645(d), as amended, 18 U.S.C. 1001, 18 U.S.C. 287, and any other applicable laws. Persons or concerns are subject to criminal penalties for knowingly making false statements or misrepresentations to SBA for the purpose of influencing any actions of SBA pursuant to section 16(a) of the Small Business Act, 15 U.S.C. 645(a), as amended, including failure to correct “continuing representations” that are no longer true.” - 13 C.F.R. § 121.108(e)

# PRACTICAL EXAMPLES

# Practical Examples

- Example 1:
  - According to the RFP's Performance Work Statement (PWS), the contractor will perform Logistics Operations Solutions Support for federal civilian and DoD consumers operating in and around Hawaii. The contractor is responsible for “a total supply chain solution” including “sourcing, procuring, warehousing, [and] transporting or arranging for transportation/delivery” of various supplies and products, predominantly “office supplies, janitorial and sanitation supplies, and industrial products.” The purpose of the procurement is “to support overseas customers by utilizing a more expeditious solution to supply items to the customer.” The RFP indicates that the Service Contract Act will apply to the procurement.

# Practical Examples

- Example 1, cont.:
  - The Contracting Officer selected NAICS Code 493190
  - The challenger argues that the instant procurement is primarily for products, with only an incidental requirement for warehousing. SBA regulations require that “[a]cquisitions for supplies must be classified under the appropriate manufacturing or supply NAICS code”. (Id., quoting 13 C.F.R. § 121.402(b)(2).) The CO therefore was required to assign a manufacturing NAICS code, not a services NAICS code such as 493190. Because the primary purpose of the acquisition is supplies, the CO clearly erred by not assigning the NAICS code that best describes the principal purpose of the procurement.

# Practical Examples

- Example 1, cont.:
  - The agency argues that the RFP requires the contractor to: procure and source items from suppliers; perform inventory management; package and ship orders; ensure that suppliers comply with domestic sourcing restrictions; comply with transportation requirements; acquire and maintain distribution equipment and resources; and perform warehouse management and operations. These services represent “the bulk of the requirement” and are “most heavily weighted in the evaluation.”

# Practical Examples

- Example 1, cont.:
  - NAICS code 493190 is one of several codes in NAICS subsector 493, Warehousing and Storage.
  - The NAICS Manual contains the following description of NAICS subsector 493 as a whole: Industries in the Warehousing and Storage subsector are primarily engaged in operating warehousing and storage facilities for general merchandise, refrigerated goods, and other warehouse products. These establishments provide facilities to store goods. They do not sell the goods they handle. These establishments take responsibility for storing the goods and keeping them secure. They may also provide a range of services, often referred to as logistics services, related to the distribution of goods. Logistics services can include labeling, breaking bulk, inventory control and management, light assembly, order entry and fulfillment, packaging, pick and pack, price marking and ticketing, and transportation arrangement. However, establishments in this industry group always provide warehousing or storage services in addition to any logistic services. Furthermore, the warehousing or storage of goods must be more than incidental to the performance of services, such as price marking.

# Practical Examples

- Example 1, cont.:
  - 339940, Office Supplies (except Paper) Manufacturing, consists of: establishments primarily engaged in manufacturing office supplies. Examples of products made by these establishments are pens, pencils, felt tip markers, crayons, chalk, pencil sharpeners, staplers, modeling clay, hand operated stamps, stamp pads, stencils, carbon paper, and inked ribbons.

# Practical Examples

- Example 1, cont.:
  - In the instant case, as in *SupplyCore*, although supplies and products do appear to constitute a majority of contract dollar value, many of the supplies and products must be obtained from mandatory sources of supply. Section II.A, supra. With regard to such supplies and products, the contractor will have limited, if any, ability to negotiate price, and instead will function as a conduit for the delivery of supplies and products from the mandatory sources. Further, the RFP makes clear that, in addition to providing supplies and products, the contractor must offer a “total supply chain solution”, including warehousing, transportation, a customized e-portal system, and other related services. *Id.* Indeed, the RFP states that the awardee will be selected based largely on its capability and experience in performing such work. *Id.* Thus, as in *SupplyCore*, NAICS code 493190 is appropriate for the instant procurement.



# Practical Examples

- Example 1, cont.:

| <b>Subsector 493 – Warehousing and Storage</b> |                                      |        |  |
|--|--------------------------------------|--------|--|
| 493110   | General Warehousing and Storage      | \$27.5 |  |
| 493120   | Refrigerated Warehousing and Storage | \$27.5 |  |
| 493130   | Farm Product Warehousing and Storage | \$27.5 |  |
| 493190   | Other Warehousing and Storage        | \$27.5 |  |

| <b>Subsector 339 – Miscellaneous Manufacturing</b> |   |  |       |
|--|---|--|-------|
| 339112   | Surgical and Medical Instrument Manufacturing |  | 1,000 |
| 339113   | Surgical Appliance and Supplies Manufacturing |  | 750   |
| 339114   | Dental Equipment and Supplies Manufacturing   |  | 750   |
| 339115   | Ophthalmic Goods Manufacturing                |  | 1,000 |
| 339116   | Dental Laboratories                           |  | 500   |
| 339910   | Jewelry and Silverware Manufacturing          |  | 500   |
| 339920   | Sporting and Athletic Goods Manufacturing     |  | 750   |
| 339930   | Doll, Toy, and Game Manufacturing             |  | 500   |
| 339940   | Office Supplies (except Paper) Manufacturing  |  | 750   |

# Practical Examples

- Example 2:
  - Lease of a new mobile CT scanner for one base year, with two option years. Required is a minimum 64-slice mobile CT unit, able to perform CT exams of the head, neck, body and extremities, and able to perform 3D CT angiography. The CT unit shall include the most current hardware and software, be capable of performing the highest quality CT scans, and have a minimum table capacity of 400 lbs. The contractor will provide accessories and positioning devices. VA personnel will operate the mobile CT scanner. However, the contractor will deliver, set up, and test the unit. The contractor will pay for a Radiation Physicist to inspect the unit upon delivery and at any time maintenance on it would impact radiation output. Annual testing is also required. The contractor must provide full-service maintenance and OEM parts and labor.

# Practical Examples

- Example 2, cont.:
  - CO assigned NAICS Code 334517, Irradiation Apparatus Manufacturing, with a corresponding size standard of 1,000 employees.
  - Challenger asks for a change to NAICS Code 621512, a services code, which better describes the lease requirement for diagnostic imaging centers primarily engaged in producing images of the patient.

# Practical Examples

- Example 2, cont.:
  - 621512, Diagnostic Imaging Centers, covers diagnostic imaging centers primarily engaged in producing images of the patient generally on referral from a health practitioner.
  - As the CO correctly observes, though, the contractor here is not charged with performing any diagnostic imaging services. Instead, VA's own personnel will perform this work, using equipment leased from the contractor. While it is true that the contractor will perform some additional services beyond leasing the equipment to VA, the specific services required are very limited and relate solely to the equipment, e.g., testing, maintenance, and training VA personnel to operate the device. *Id.* These are not patient services. Indeed, based on the RFQ, there is no indication the contractor would ever perform diagnostic imaging on patients. Thus, Appellant's recommendation of code 621512 clearly fails.

# Practical Examples

- Example 2, cont.:
  - 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing, covers: establishments primarily engaged in renting or leasing nonconsumer-type machinery and equipment (except heavy construction, transportation, mining, and forestry machinery and equipment without operators; and office machinery and equipment). Establishments in this industry rent or lease products, such as manufacturing equipment; metalworking, telecommunications, motion picture, theatrical machinery and equipment, or service industry machinery; institutional (i.e., public building) furniture, such as furniture for schools, theaters, or buildings; or agricultural equipment without operators.
  - Appellant has shown that the CO clearly erred in selecting code 334517, and the appeal is GRANTED to that extent. The most appropriate code for this procurement is 532490, Other Commercial and Industrial Machinery and Equipment Rental and Leasing, with a corresponding size standard of \$32.5 million average annual receipts.

# Practical Examples

- Example 2, cont.:

|        |   |  |       |
|--------|---|--|-------|
| 334517 | Irradiation Apparatus Manufacturing<br>Other Measuring and Controlling Device |  | 1,000 |
|--------|---|--|-------|

|        |                            |        |  |
|--------|----------------------------|--------|--|
| 621512 | Diagnostic Imaging Centers | \$15.0 |  |
|--------|----------------------------|--------|--|

| NAICS Codes | NAICS Industry Description   | Size Standards in millions of dollars | Size standards in number of employees |
|-------------|--|---------------------------------------|---------------------------------------|
| 532490      | Other Commercial and Industrial Machinery and Equipment Rental and Leasing | \$32.5                                |                                       |

# Summary

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# Any questions?

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