



PUBLIC  
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*PCI Protests Series - 2024*

# Small Business Eligibility and Size/Status Protests

# Meet the Presenter



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# Meet the Presenter



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# A Primer on Protest Types

- **Bid Protests**: Challenge raised by contractor (competitor); challenge based on alleged improprieties in source selection process (i.e. failure of agency to comply with applicable law, terms of solicitation, etc.)
- **Size Protests**: Challenge raised by contractor (competitor); challenge based on awardee eligibility (specifically with regard to size, including affiliation)
- **Status Protests**: Challenge raised by contractor (competitor); challenge based on awardee eligibility (specifically with regard to other eligibility issues such as unconditional ownership/control, etc.)

IT STARTS WITH  
UNDERSTANDING  
ELIGIBILITY...

# Why Does Size/Small Business Program Eligibility Matter?

- The Rise of the Federal Small Business Programs and Set-Aside Contracts
- Small, and Special Types of Small
- Increased Competition → Protests
  - Challenges to Eligibility of Awardee

# What is a “Small” Business

- 13 CFR Part 121
- Not Your Everyday Understanding
- NAICS Codes
  - Industry Based
- NAICS Codes → Associated Size Standards
  - Based on employees or average annual receipts
  - Represents largest size a contractor can be and remain “small”
- A “Sometimes Small” Business?

# 8(a) Businesses – 13 CFR Part 124

- A “Small” Business (The applicable size standard is the one for its **primary** industry classification)
- At least 51% Unconditionally Owned, and Unconditionally Controlled, by One or More Individuals Who Are:
  - Socially Disadvantaged
  - Economically Disadvantaged
  - Of Good Character
  - Who Demonstrate Potential For Success

*\*Special considerations for concerns owned by Indian Tribes, ANCs, NHOs, or CDCs – 13 CFR 124.109, 124.110, and 124.111*



# 8(a) Businesses – Social Disadvantage

## 13 CFR 124.103

- Definition
- Two Categories
  - Certain Individuals Have A Rebuttable Presumption of Social Disadvantage
  - Individuals Not Members of Designated Groups

# 8(a) Businesses – Economic Disadvantage

## 13 CFR 124.104

- Definition
- Factors to Be Considered:
  - Net Worth
  - Personal Income (3 Years)
  - Fair Market Value of All Assets
- Be Wary of Transfers!

# 8(a) Businesses

- Good Character – 13 CFR 124.108(a)
- Potential For Success – 13 CFR 124.107
  
- Graduation Day

# 8(a) Businesses

- Tribally-Owned Concerns
- ANCs
- NHOs
- CDCs

# HUBZone Small Businesses - 13 CFR Part 126

What is a “HUBZone”?

- A **historically underutilized business zone**, which is an area located within one or more:
  - 1) Qualified census tracts;
  - 2) Qualified non-metropolitan counties;
  - 3) Lands within the external boundaries of an Indian reservation;
  - 4) Qualified base closure areas;
  - 5) Redesignated areas; or
  - 6) Qualified disaster areas.

# HUBZone Small Businesses

What is a “HUBZone”?

- **HUBZone Map** (Last Updated July 1, 2023; Next Update July 2028)

# HUBZone Small Businesses

What is a HUBZone SBC?

- A “Small” Business (under the size standard corresponding to any NAICS code listed in its profile)
- Meets Ownership Requirements
- Principal Office in a HUBZone
- 35% of Employees Reside in a HUBZone

# Veteran-Owned Small Businesses

## Formerly, Two Programs

One, run by the Department of Veterans Affairs

- The VA's program governed eligibility for VOSB/SDVOSB set-aside procurements issued by the VA
- Verified in VetBiz VIP Database, application process
- VOSB/SDVOSB

The other, run by the SBA

- The SBA's program governed eligibility for SDVO SBC set-aside procurements issued by agencies other than that VA
- Self-certification
- SDVO SBC



# Veteran-Owned Small Businesses Formerly, Two Programs

- Different Definitions
- Inconsistent, Draconian Results
- Then... Gov't Consolidated Definitions (but kept programs separate)
- Now, ONE Program! - 13 CFR Part 128 (formerly part of Part 125)

# SBA's Veteran Small Business Certification (VetCert) (January 2023)

## Single Program Run by SBA

- SBA's VetCert now governs eligibility for VOSB/SDVOSB set-aside procurements
- VA's database of verified firms transferred to SBA
- Must be certified VOSB/SDVOSB to be awarded a VOSB/SDVOSB set-aside or sole-source contract across federal government

## The Role of the VA?

- VA's Veterans First contracting authority not affected
- VA will continue to determine **veteran** status for VOSBs and SDVOSBs and maintain records for SBA to rely upon for certification process

# Veteran-Owned Small Businesses

- VOSB
  - A “Small” Business (under the size standard corresponding to any NAICS code listed in its SAM profile)
  - Not less than 51% owned and controlled by one or more veterans

# Veteran-Owned Small Businesses

- SDVOSB
  - A “Small” Business (under the size standard corresponding to any NAICS code listed in its SAM profile)
  - Not less than 51% owned and controlled by one or more service-disabled veterans
  - Or, in the case of a veteran with a disability that is rated by the Secretary of Veterans Affairs as a permanent and total disability who are unable to manage the daily business operations of such concern, the spouse or permanent caregiver of such veteran

# Women-Owned Businesses - 13 CFR Part 127

- WOSB:
  - A “Small” Business (under the size standard corresponding to any NAICS code listed in its SAM profile)
  - At least 51% unconditionally and directly owned and controlled by one or more women who are US Citizens

**\*\*Note NAICS Limitations**

**\*\*No longer a self-certify process**

# Women-Owned Businesses - 13 CFR Part 127

- EDWOSB:
  - A “Small” Business (under the size standard corresponding to any NAICS code listed in its SAM profile)
  - At least 51% unconditionally and directly owned and controlled by one or more women who are US citizens and are **economically disadvantaged**

*\*\*Note NAICS Limitations*

*\*\*No longer a self-certify process*

# WHEN DO THE PROTESTS COME?

# On What Might Your Competitors Base Their Challenge? A Summary Overview

- Affiliation → Size
- Control
- Ownership
  
- Teaming, JV, MP Mistakes
- Mistakes on Multiple Award Contracts & Vehicles → Recertification?



# Affiliation

- What is Affiliation?
- What Impact Does it Have on Size?
- Does It *Always* Matter?

# Affiliation

## General Principles of Affiliation

- 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
- Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party

# Affiliation

## **Totality of the Circumstances**

- Sharing...
  - ...Anything
- Relationships
  - Familial
  - Ex Employee
- Frequent Subcontracting
- Financial Reliance
- Control – Concepts Closely Linked

# Control

- **Unconditional Control**
  - Day to Day Management
  - Long Term Decision Making

# Control

## Special Considerations Under SDVOSB Rules

- At time of consolidation:
  - A list of situations that would lead to a rebuttable presumption of control by Non-SDVs was added. Included a list of things similar to affiliation but also some common control concepts (co-location or other sharing of resources, equipment, etc.; common management; former employee/employer relationship; financial reliance including through critical financial or bonding support; critical licenses... and a catch all.)
  - Also added were sections dealing with “Normal Business Hours” and “Close Proximity” (And just for good measure another section on critical financing)
  - Supermajority provisions notice requirement

# Control

## Special Considerations Under SDVOSB Rules

- New regulation more similarly laid out to 8(a) and WOSB/EDWOSB regulations
  - Managerial Position and Experience
  - Supermajority Requirements
  - Unexercised Rights
  - Limitations on Control by Non Qualifying Vets
  - Limitations on Outside Obligations
  - Exception for Extraordinary Circumstances
  - Exception for Active Duty
  - No Close Proximity

# Ownership

- **Direct Ownership**
- **Unconditional Ownership**

# Common Problem Areas

- Teaming
- Joint Ventures / Mentor Protégé
- Multiple Award Vehicles → Recertification



# THE SIZE/STATUS PROTEST PROCESSES

# Size and Status Protests - WHY

- Remember...
- It's the Protestor's Challenge to:
  - Size (Affiliation) and/or
  - Status

of the Awardee

- Remember Comparison to Bid Protests...

# Size VS. Status Protests

- Size Protests – 13 CFR 121.1001 *et seq.*
- Status Protests – Program Specific
  - 8(a) – 13 CFR 124.517 (size only → Part 121)
  - HUBZone – 13 CFR 126.800 *et seq.*
  - VOSB/SDVOSB – 13 CFR 128.500 → 13 CFR 134.1001 *et seq.*
  - WOSB/EDWOSB – 13 CFR 127.600 *et seq.*

# Size and Status Protests - WHO

- Only an “Interested Party” Has Standing to File a Protest

# Size and Status Protests - WHAT

- What does a Protestor File?

# Size and Status Protests – WHERE

- Where does a Protestor File?

# Size and Status Protests - WHEN

- What is the Deadline to File a Size/Status Protest?

# Size and Status Protests – What Happens Next?

- And Then What....



# Size & Status Protests – The Process, Defense

- If you are the Protested Concern, do you have a Chance to Defend Yourself?
- After a Protest is Filed, What Happens?
  - How is it Different than the Bid Protest Process?

# QUESTIONS?

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