

Critical Changes for Small Business

February 27th, 2024

Agenda

- Introductions
- Contracts awarded as Small Business
- Presentation
- Q&A – Please use the chat feature to ask question

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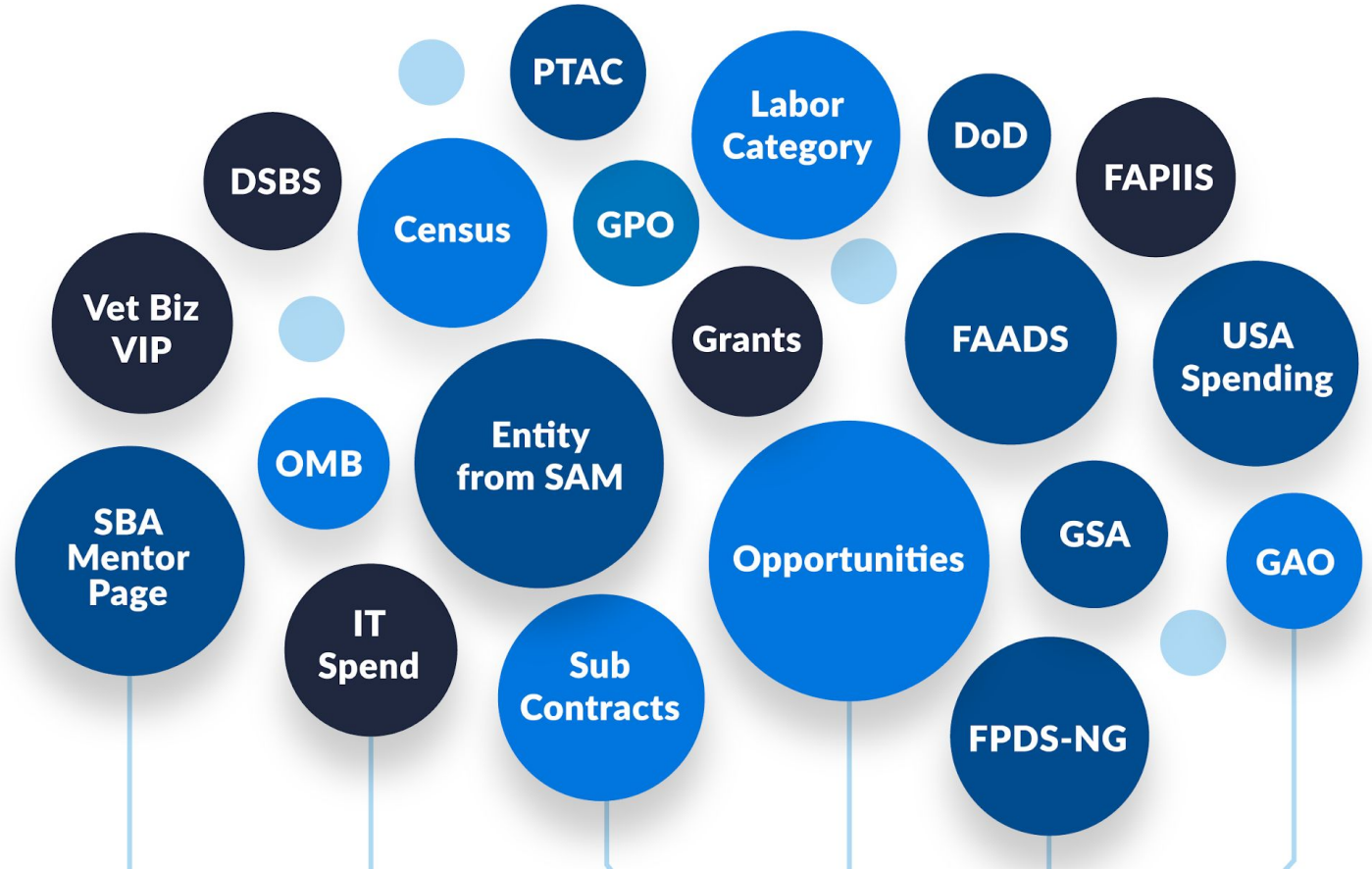
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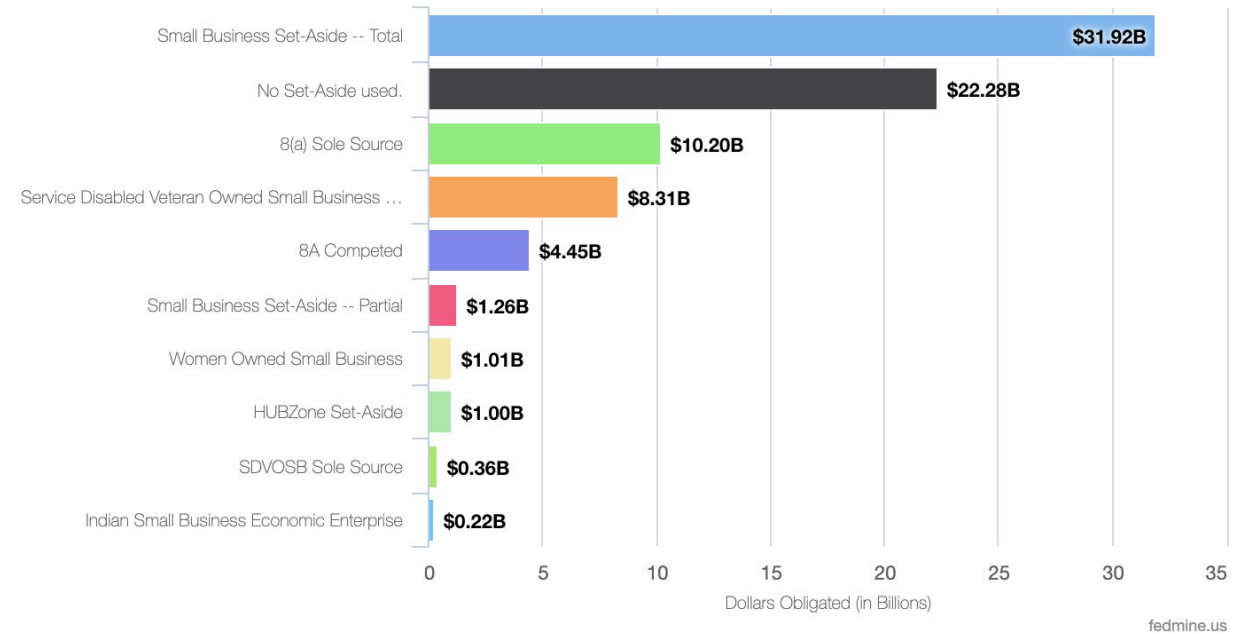
Federal Contracts Awarded as Small Business Contracts

In FY 23, \$775.8 B is awarded to 109,938 companies

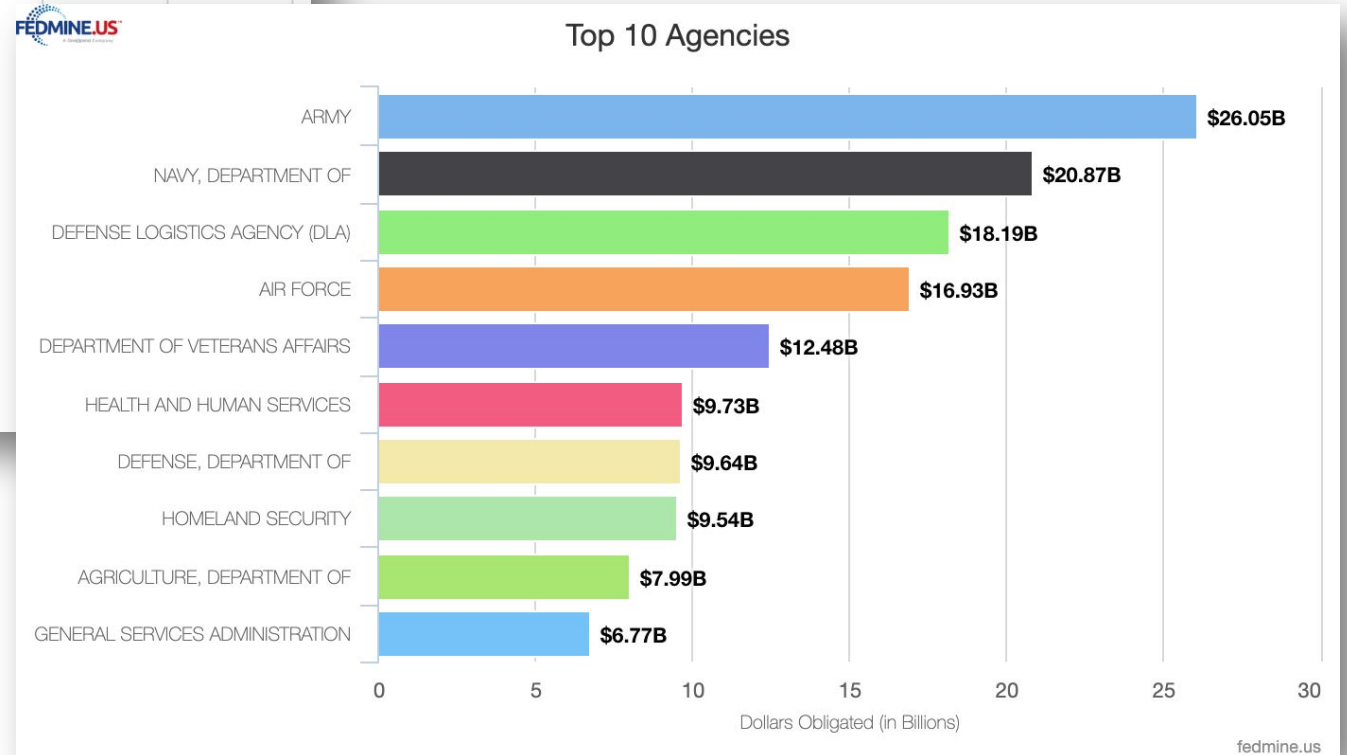
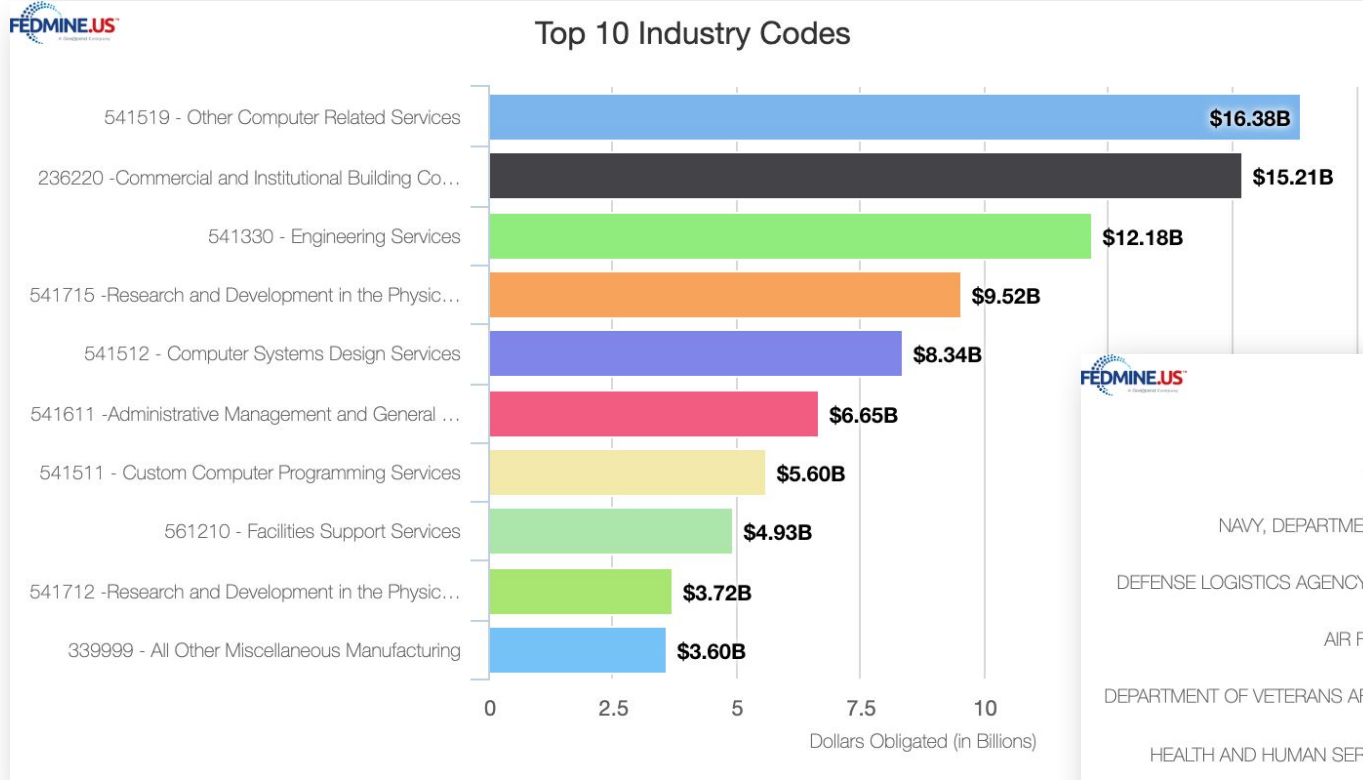
22.6% of total awards, or \$171.4B are awarded as Small Business Contracts to 79,086 companies



Top 10 Type Of Setaside



Federal Contracts Awarded as Small Business Contracts



**McCarter
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Critical Changes For Small Businesses

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Introduction: Be Wary, Discuss & Prepare!

- 2022-23 were BIG years for (Proposed) Changes to the Small Business Regulations!
- More Still In the Works...
- Trying to Hit Highlights Here – Strongly Recommend a **Full Review with Your Legal Team!**

Agenda

- Consolidation of VOSB/SDVOSB Programs
- SBA Final Rule April 2023
- 8(a) Developments

VOSB/SDVOSB Consolidation

Formerly, Two Programs

One, run by the VA

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

The other, run by the SBA

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

Problems with the Two Program System

- Two sets of regulations; different definitions
- Lack of predictability
- “Draconian” and inconsistent results
- Contractors NOT happy

A Long Time Coming...

- First, Streamlining of Definitions
- Then...Section 862 of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, 128 Stat. 3292 (January 1, 2021) (NDAA 2021)
- [Final Rule](#) - Federal Register - 87 FR 73400 (Nov. 29, 2022) (Went into effect January 1, 2023)

Now, One 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

What Changed? “Small” Under the New Rule

To qualify as a VOSB, a business entity must be:

- (1) A small business concern ... under the size standard corresponding to **any NAICS code** listed in its SAM profile;
- (2) Not less than 51 percent owned and controlled by one or more veterans.

To qualify as an SDVOSB, a business entity must be:

- (1) A small business concern ...under the size standard corresponding to **any NAICS code** listed in its SAM profile;
- (2) Not less than 51 percent 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.

What Else Changed?

- Where the regulations ARE – 13 CFR 128 (no longer 125)
- Removed requirement that business demonstrate “good character” to receive VOSB/SDVOSB certification (responsibility requirements, e.g., no active exclusions in SAM, still apply)
- Some clarifications on control, definition of “extraordinary circumstances” in connection with same
- Some Adjustments to Control Rules
- Status Protests to SBA OHA
- JV Certification

What Now?

- Going Forward...

April 27, 2023 Final Rule

Source of Changes

- On April 27, 2023, the Small Business Administration (SBA) issued a [final rule](#)
- It finalized an earlier September 9, 2022 [proposed rule](#)

...and made a myriad of changes to the Small Business Regulations. Those changes were effective May 30, 2023.

Ostensible Subcontractor

An ostensible subcontractor is a subcontractor that is:

- Not a similarly situated entity (i.e., a subcontractor that has the same small business program status as the prime contractor); and
- Performs primary and vital requirements of a contract, or of an order, **or**
- Is a subcontractor upon which the prime contractor is unusually reliant

13 CFR § 121.103(h)(2)

Ostensible Subcontractor

Final Rule revises 13 CFR 121.103(h) to:

1. Clarify how the Ostensible Subcontractor Rule applies to general construction contracts; and
2. Provide guidance on the utilization of the *DoverStaffing* factors in determining whether a subcontractor is an “ostensible subcontractor”

Ostensible Subcontractor – General Construction Contracts

Final Rule (13 CFR § 121.103(h)(3)): Clarifies that for general construction contracts-

- Ostensible subcontractor rule for general construction contracts should be applied to the management and oversight of the project, not to the actual construction or specialty trade construction work performed. The prime contractor must retain management of the contract but may delegate a large portion of the actual construction work to its subcontractors.
- General construction contracts regularly involve subcontractors with specialized experience in the specialty construction trade. The primary role of a prime contractor in a general construction project is to superintend, manage, and schedule the work, including coordinating the work of various subcontractors. Those functions that are the primary and vital requirements of a general construction contract and ones that a prime contractor must perform.

Still must meet limitation on subcontractor requirement set forth in § 125.6(a)(3)!

Ostensible Subcontractor – Unusual Reliance

Final Rule (13 CFR § 121.103(h)(3)):

- Aligns SBA regulations with recent decisions of SBA's Office of Hearings and Appeals (OHA). In *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011), OHA created a four factor test to indicate when a prime contractor's relationship with a subcontractor is suggestive of unusual reliance under the ostensible subcontractor rule.
- Rule adds two of the four factors to the ostensible subcontractor rule:
 - the reliance on incumbent management; and
 - the reliance on the subcontractor's experience.

Note! SBA will still consider all aspects of the prime contractor's relationship with the subcontractor and will not limit its inquiry to the enumerated *DoverStaffing* factors!

Limitations on Subcontracting

- Generally
- MACs
- **Adding Teeth!**

Affiliation, Joint Venture, MP Related Issues (Selected; Summary)

Clarifications

- Two Year Rule: Contracts ≠ Orders
- Recertification
 - *De minimus* “Sale” ≠ “Merger”
 - “Recertification” ≠ New Contract

Affiliation, Joint Venture, MP Related Issues (Selected; Summary)

- Same Mentor, Second Term
- Prohibition on Member of Multiple JVs Competing for Same Contract (no self competition)
- Mentor-Protégé – Merger and Multiple (>3) Protégés

Affiliation, Joint Venture, MP Related Issues (Selected; Summary)

- HUBZone Joint Venture SAM Registration
- Populated JVs

Initiation of a Size Protest – Standing

Final Rule (13 CFR § 121.1001):

- Adopts the language currently used for small business set-asides and competitive 8(a) contracts and apply to all of SBA's program (i.e., Any 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 may protest).

This standardizes who is an interested party to initiate a protest among the different SBA programs.

Timing of Size/Status Protests in Sealed Bids

Previous Rule:

- An interested party must protest the size or socioeconomic status of the low bidder within five business days after bid opening.

Final Rule:

- Where the identified low bidder is determined ineligible for award, protests of any other identified low bidder would be deemed timely if received within five business days after the contracting officer has notified the protester of the identity of the new low bidder.

Concurrent GAO Protest and Size/Status Protest(s)

Final Rule:

- Formalized current SBA policy that when the SBA receives a size protest that is simultaneously being protested at the GAO, SBA will suspend the size protest pending the outcome of the GAO decision. This is because the outcome of the GAO protest may require corrective action, affecting the apparent successful offeror.

13 CFR § 121.1009 would include a new section incorporating this SBA policy

Dismissal of Size Protest in Event of Corrective Action Taken in Bid Protest

Final Rule:

- Adds a new 13 CFR § 121.1004(g) providing that in the event an agency takes corrective action in response to a GAO protest, SBA will generally dismiss any size protest relating to the initial apparent successful offeror.
- Avoid situations where SBA proceeds with a size determination that as a result of agency corrective action, may no longer be the awardee.

HUBZone (Selected; Summary)

- Primary NAICS → Any NAICS in which it currently conducts business activities/listed in SAM profile
- HUBZone Applications / Decertification
- HUBZone Status Protest Grounds

WOSB/EDWOSB (Selected; Summary)

- Primary NAICS → Any NAICS in which it currently conducts business activities/listed in SAM profile
- Unconditional Ownership
 - Death or incapacity
 - Limitation on Outside Employment
- Certification

Other Changes

The Continuing Saga of the 8(a) Program

2023 - 8(a) Developments

- Old Status Quo - Social Disadvantage, Two Ways to Establish
- *Ultima Servs.*
- Temporary Suspension
- Changes for Participants
- Re-Opened Applications
- What Next?

Questions?

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Key Concepts in Federal Subcontracting

March 12th, 2024 at 12 noon EST

Win more work! Understand how Air Force funds construction projects

March 26th, 2024 at 12 noon EST

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