



Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

LEGAL MEMORANDUM

TO: File
FROM: Christine V. Williams
SUBJECT: New SBA Regulations--June 2016

Executive Summary:

The SBA Regulations Implementing the NDAA 2013 Amendments

Final sweeping rules issued by the SBA were implemented today to apply provisions of the National Defense Authorization Act, which pertain to performance requirements applicable to small businesses and socioeconomic program set-aside contracts as well as small business subcontracting. It also amends the SBA's regulations relating to the nonmanufacturer rule and affiliation rules. Finally, this rule allows a joint venture to qualify as small for any Government procurement so long as each partner to the joint venture qualifies individually as small under the size standard corresponding to the NAICS Code.

As these regulations are further publicly explored and discussed including between Outlook Law (Christine Williams) and the SBA in two weeks on its upcoming regulatory panel, updates will be provided that may take this initial read out of draft form. Ms. Williams took 60 plus pages of regulatory analysis and regulations and boiled it down to bullet points, which may be accessed here.

<http://outlooklaw.com/legal-updates/>

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

Index

I.	Introduction and Summary	1
II.	Limitations on Subcontracting	3
III.	Similarly Situated Entities	4
IV.	HUBZone and Similarly Situated Entities	6
V.	Subcontracting Plans and Naming Small Businesses	6
VI.	Affiliation and Identity of Interest	6
VII.	Joint Ventures and Exclusions from Affiliation	8
VIII.	Calculation of Annual Receipts	8
IX.	Recertification after Merger and During Procurement Process	8
X.	Who May Initiate a Size Protest	8
XI.	NAICS Codes Appeals and Timing	8
XII.	Nonmanufacturer Rule	9
XIII.	Adverse Impact and Construction Requirements	9
XIV.	Bundling and Consolidating the Role of the Procurement Center Representative	10
XV.	Certificate of Competency	10

Here is the link to the full 60 day regulatory link.

<https://www.federalregister.gov/articles/2016/05/31/2016-12494/small-business-government-contracting-and-national-defense-authorization-act-of-2013-amendments>

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

Limitations on Subcontracting 13 CFR 125.6

13 CFR 121, 124, 125, 126, and 127 = 13 CFR. 125.6

- The SBA attempts to bring in all the limitations on subcontracting or mandatory performance level by a small business concerns (“SBC”) under one regulation: 125.6
- 125(a) explains how to apply the limitations on subcontracting requirements to small business concerns contracts using ***based on the percentage of the award amount*** (not the cost to perform the contract) and that certain small business concerns may not expend on subcontracts more than a specified amount, dictated by the type of contract performed UNLESS the (non) subcontract goes to a similarly situated entity (as further explained below).
- In short, if a similarly situated entity performs as a ***first tier subcontractor*** that performance may count towards the mandatory performance required by the contract. The performance by a similarly situated entity in those circumstances is not considered a subcontract that counts towards the limitation on subcontracting and against the mandatory performance level.
- Limitation for ***services and supplies*** is statutorily set at 50% of the ***award amount***.
- For contracts involving services and supplies, the SBA clarified that the contracting officer’s selection of the applicable NAICS Code will determine which limitation applies.
- ***The exclusion for the cost of materials*** from supply, construction, and specialty trade construction procurements is included in this final rule.
- For contracts that supply both services and supplies, the statutory authority authorizes that the limitations on subcontracts apply only to that portion of the requirement identified as the primary purpose of the contract.
- All costs associated with providing the services, including any overhead or indirect costs associated with those services, must be included in determining compliance.

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

Similarly Situated Entities

- Under 13 CFR 125.1, a similarly situated entity is a subcontractor that has the same small business program status as the prime contractor. This means that. . . for an 8(a) requirement, a subcontractor that is an 8(a) certified Program Participant. In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS Code that the prime contractor assigned to the subcontract that the subcontractor will perform.
- The NDAA deems any work done by a similarly situated entity (for instance an 8(a) contractor is similarly situated to another 8(a) contractor) is not considered to be “subcontracted” for the limits on subcontracting, but may be counted towards the mandatory performance level for the small business concern acting as the prime contractor.
- What that breaks down to is that similarly situated subcontractors or the respective subcontracts *at the first tier only* are not subcontractors in the traditional sense of the word and can be counted towards the prime’s mandatory performance levels on the contract.
- **Caution:** the work performed *must be performed* by the employees of the prime contractor or employees of the first tier similarly situated entity to count towards the mandatory performance requirements. If a first tier similarly situated entity subcontracts out work, that work will count as subcontracts performed by a non-similarly situated entity.
- The SBA is *not requiring* a written agreement with a predetermined similarly situated entity. That plan was not in place for SDVO or HUBZone programs. The SBA was concerned about the administrative burden placed on small business concerns and the programs having different burdens placed upon them.
- The SBA is not requiring mandatory performance limits be reported to the contracting officer as this was not necessarily authorized by the statute and the SBA did not and does not require it for SDVO or HUBZone Programs.
- **Upcoming Proposed Rule:** the SBA is aware of the GAO’s recommendations to strengthen and monitor the oversight of mandatory performance levels by SBCs, including 8(a) firms. As such, the SBA will likely go through the formal rule process to address that mandatory reporting requirement more appropriately.

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

- The SBA clarified its proposed rule in that if a firm failed to meet its mandatory performance goals using similarly situated entities, the SBA *could* consider this as a basis for debarment, but the firm would have an opportunity to respond to any allegation with its own arguments and evidence.
- ***Similarly Situated*** as it related to **Architects and Engineers Contracts**. Commenters to the rule were concerned that contracts awarded to an architecture firm having a size standard that is less than the size standard for engineering services would disqualify the engineering firm from performing. In response to these comments, *the SBA is allowing prime contractors to assign NAICS Codes* to the subcontracts. In this way, the SBA believes the approach will increase the ability of small business prime contractors to utilize similarly situated business entity subcontractors. In addition, this rule is consistent with the requirement that *SBA rules require a prime contractor to assign the NAICS Code* to a subcontract which describes the principal purpose of the subcontract. [13 CFR 125.3]
- ***Fines and Penalties***. The SBA notes that the \$500,000 dollar fine is the minimum amount (or the amount spent in excess of the permitted levels if greater) mirrors Section 1652 of the NDAA. The SBA believes this will deter contractors from agreeing to comply with limitations on subcontracting without a practical plan for compliance with applicable subcontracting limitations as well as passing on work to firms that the prime has adequately ensured is similarly situated.
- ***Exemption from Affiliation for Ostensible Subcontracting Rule***. This exemption applies to the relationship between the prime and a similarly situated entity. In short, the prime and similarly situated first tier sub will not be found affiliated based on the ostensible subcontractor rule (think primary/vital and/or unduly reliant roles).
- ***Who Counts the Revenue***: The prime contractor will count the revenue (such as the revenue attributed to an 8(a) contract) when a similarly situated entity is used as a subcontractor and the prime contractor will not deduct the revenue amount subcontracted to that entity.

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

HUBZone Similarly Situated Entities 13 CFR 126.200

- The SBA clarifies that a HUBZone similarly situated entity must be able to qualify as a HUBZone prime procurement in order to be considered a similarly situated entity.
- The SBA also revises the performance of work requirements and uniformly refers the reader to the appropriate regulations for all programs, 13 CFR 125.6.

Subcontracting Plans and Naming Small Business Concerns in the Plans 13 CFR 125.3

- The NDAA modifies the Small Business Act to state that a contractor that fails to provide a written corrective plan performance or fails to make a good faith effort to comply with its subcontracting plan will not only be a breach of the contract, but such a failure should be considered in rating a firm's past performance (*i.e.*, CPARs).
- The SBA states in response to concerns to this rule, that the contracting officer is already bound to consider past performance of a firm.
- The SBA also notes that it reviews and completes supplements to the contracting agency's overall review of subcontracting plans' performances.
- If a small business concern is named in a subcontracting plan, then there are two requirements that must be met -(1) that the notification is in writing and (2) that the written notification is given to the subcontractor.
- The SBA Administrator is also required to establish a reporting mechanism that allows potential small business concern subcontractors to report fraudulent activity or bad faith behavior by the prime contractor with respect to the subcontracting plan.

Affiliation 13 CFR 121.103(f)

- ***Identity of Interest***
- The SBA added additional guidance on how to analyze affiliation due to an identity of interest (1) type of relationship and economic dependence.
 - ***Type of Relationship***
 - The SBA narrowed the (familial) relationships for identity of interest to a seemingly more reasonable level. Now ***the presumption***

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

(presumption means its rebuttable) exists for firms that conduct business with each other that are owned and controlled by: (1) married couples; (2) parties to a civil union; (3) parents and children; and (4) siblings.

- The SBA believes this agrees with the SBA's Office of Hearings and Appeals ("OHA") determinations.
- ***Economic Dependence.***
- If a firm derives 70% or more of its revenue from another firm over the previous fiscal year, SBA presumed and will presume that one firm is economically dependent on the other and likely find affiliation.
- This presumption is also rebuttable and the SBA gave examples of some rebutting evidence and acknowledged that OHA used that 70% as guidance as well as allowing that 70% to be rebutted.
- For instance, if a start-up secures just two contracts then one contract may skew the revenue for that fiscal year.
- Additionally, where the receipts from an alleged affiliate are ***not strong enough*** to sustain a firm's business operations, and the firm is able to look to other financial support, such as some Alaska Native Corporations may have the ability to do, the fact that the firm received 70% of its receipts from an alleged affiliate may not be determinative.
- In essence, the final rule specifies that the presumption of affiliation based on economic dependence may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is ***not solely*** dependent on that other concern.
- In addition, ***in regards to economic dependence***, the SBA has clarified that it will not find affiliation between sister subsidiaries owned by the same Indian Tribe, ANC, Native Hawaiian Organization, or Community Development Corporation. (Recall, the final regulations in other spots seem to be harder on those organizations-this is not a blanket affiliation exemption.) Clue on this one is control and whether one firm has the ability to control the other; in this case, control financially through the 70% rebuttable rule.

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

Joint Ventures: Exclusion for Affiliation for Small Business 13 CFR 121.103

- Current exclusion from affiliation based on mentor protégé relationship as long as the agreement is current and followed. That stands.
- New exclusion: Broadens the exclusion and allows two or more small businesses to joint venture for any procurement without being affiliated with regard to the performance of *that procurement* requirement.
- They both must be small under the NAICS Code for that procurement.

Calculation of Annual Receipts 13 CFR 121.104

- Clarification that the SBA will continue to count passive income in its calculation of annual receipts as specified in 13 CFR 121.104.

Recertification after Merger/Acquisition and During Procurement Process 13 CFR 121.404

- Clarification that recertification is required following the merger or acquisition of a firm that submitted an offer as a small business concern by adding a paragraph.
- Specifically, the new paragraph clarifies that the SBA requires new small certification for pending contracts when the merger or acquisition occurs after offer but prior to award.

Who May Initiate Size Protests 13 CFR 121.1001(a)

- Clarification that an offeror has standing if it is in line or in consideration for award (inside the competitive range).
- There is no standing for the offeror that has been found to be non-responsive, technically unacceptable, or outside of the competitive range.
- Rule also added the SDVO and WOSB/EDWOSB to programs in which the SBA's Area Director, Officer of Government Contracting, can initiate a formal size determination, thereby matching other programs.

NAICS Code Appeals and Timing 13 CFR 121.1103

- The SBA's current rule in which there is ten days for filing a NAICS Code appeal after solicitation or amendment to a contract still stands.

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

Nonmanufacturer Rule 13 CFR 121.1203

- Unlike other programs, under the nonmanufacturer rule (“NMR”), there is no exemption for contracts between \$3,500 and \$150,000 because the SBA would like to encourage contracting officers to compete these types of contracts more often or, if not, apply for a waiver from the SBA for all or part of the contract.
- Commentators had questions on applicability of this regulation and the SBA provided the following guidance:
 - The intent is for the NMR and the contract performance requirements (a/k/the limitation on subcontracting to non-similarly situated entities) to operate in conjunction with each other.
 - Thus, the SBA believes that appropriate way to calculate the true required percentage that is limited by subcontracting is to exclude the value of the waived items from the limitation (much like construction supplies on a construction contract). The SBA has added several examples in the regulations on this point.
 - Please note that the SBA is dealing with *certain software* specifically during the course of this regulation change as an *item and not a service*. This falls in line with OHA cases and the SBA gives further guidance in its regulatory examples.

Adverse Impact and Construction Requirements 13 CFR 124.504

- The SBA clarified when a procurement for construction services is new and when the SBA must conduct an adverse impact analysis for new requirements.
- Currently, the SBA regulations states that “[c]onstruction contracts, by their very nature (*e.g.*, the building of a specific structure) are considered new requirements.
- However, recurring Indefinite Delivery or Indefinite Quantity (“ID/IQ”) procurements/orders under IDIQs and similar contract vehicles for construction services are not considered new.
- The SBA has found that some agencies have misinterpreted this regulation and considered these recurring IDIQ construction services new. The SBA now clarifies it for those agencies and others that this is not new.

Christine V. Williams
1221 West 11th Avenue, Suite 2
Anchorage, Alaska 99501
(907) 258-2200 office
(907) 301-7273 mobile
christinewilliams@outlooklaw.com

- Whether a construction contract is new is made on a case by case basis and there is now a process in place *that allows the SBA* to file an appeal with the procuring agency when there is a disagreement.

Bundling and Consolidating the SBA's Procurement Center Representative Role Defined 13 CFR 125.2

- The SBA's Procurement Center Representative ("PCR") Role is Defined to include:
- The ability to review any bundled or consolidated solicitation or contract in accordance with the Small Business Act.
- The SBA clarified that PCRs advocate, to the maximum extent practicable, the use of small business concerns in Federal Contracting, including advocating against the unjustified consolidation or bundling of contract requirement.
- PCRs will also consult regarding in-sourcing work.
- PCRs may also receive unsolicited proposals from small business concerns and to provide those proposals to the appropriate agency's personnel for review and disposition.

Certificate of Competency 13 CFR 125.5

- The SBA frequently receives inquiries regarding the application of the Certificate of Competency ("COC"), financial responsibility, and an apparent successful offeror for a IDIQ contract.
- The SBA clarified its process with proposed changed regulatory language that included the SBA's Area Director considering a firm's maximum financial capacity and if such COC is issued, it will be for a specific amount that serves as the limit for that firm's financial capacity for that contract.
- The contracting officer cannot deny the firm the award of an order or contract on the basis of financial capacity if the firm has not reached the financial maximum identified by the Area Director.

If you have any questions, please contact the author, Christine Williams, at Outlook Law, LLC.