

# Significant Recent FAR Updates, and Expected Small Business Regulatory Changes



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**ETEBA TN Meeting**

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# Who We Are

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## *Josh Mullen*

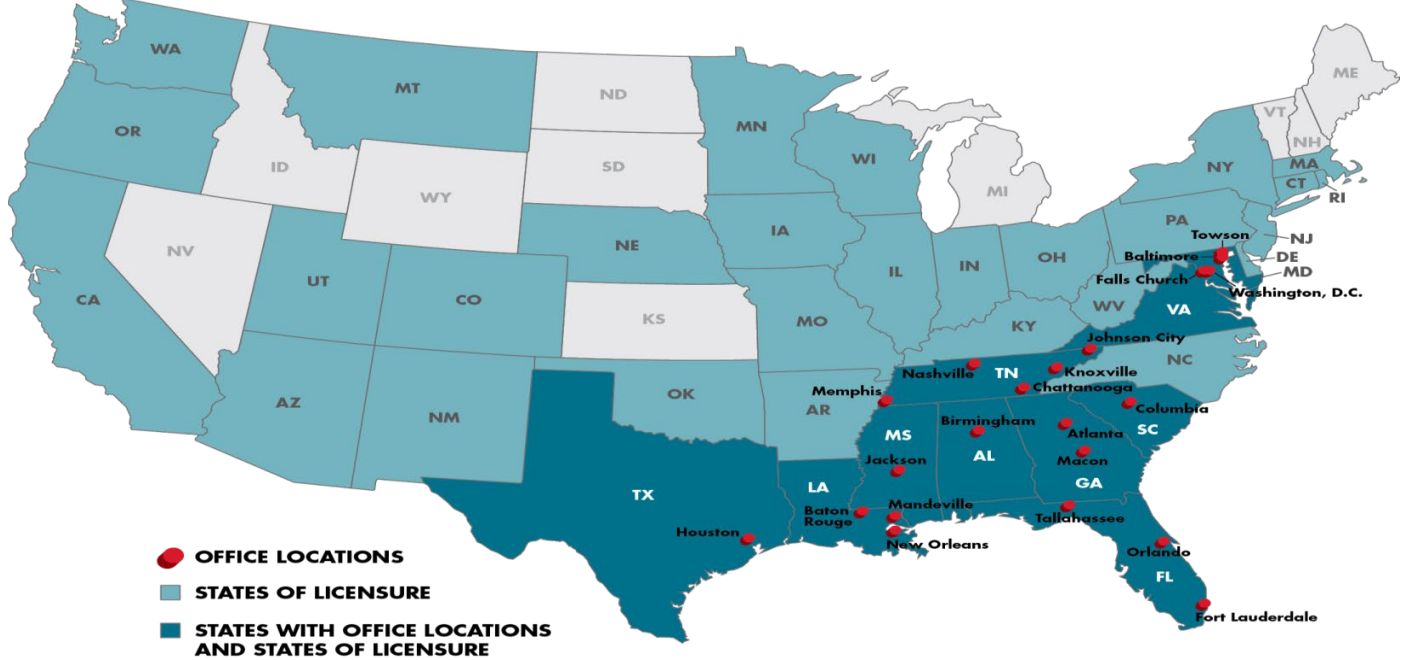


### **Shareholder at Baker Donelson, focusing in the area of Government Contracts**

- Mid-South *Super Lawyers Rising Star* in the area of Government Contracts (2014-2018)
- Advise Government Contractors regarding:
  - Compliance with FAR and other agency acquisition regulations;
  - Business structure and formation issues related to SBA set-aside programs (Mentor-Protégé Program & joint ventures, small business, VOSB, SDVOSB, WOSB, SDB, etc.);
  - Compliance with state and local procurement regulations;
  - Bid protests before the GAO and state governments;
  - Litigation and resolution of disputes; and
  - Negotiation of teaming agreements, subcontracts, novation agreements, and other agreements related to government contracts.
- Licensed to practice in Tennessee and Washington, DC

# Who We Are

More than 30 lawyers who advise government contractors throughout the southeastern United States, including clients with national markets



# Agenda

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- Review of significant recent FAR & DFARS amendments (primarily within the past two years, but some outside)
- Recent Proposed and Enacted Regulatory Changes Related to the SBA Small Business Programs
- Questions

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# SAM Registration

- **FAR update confirms that an offeror must be registered in SAM at the time of the submission of offer**
  - **Confusion before October 2018**
    - FAR 4.1102 – Required SAM registration *prior to the award*
    - FAR 52.204-8(d) – Offeror verified “by submission of the offer” that representations and certifications in SAM were current, accurate, and complete
      - (i.e., needed to be registered in SAM before the offer was submitted)
  - **NOW**
    - FAR 52.204-8 & FAR 4.1102 are consistent – Both require offerors to be registered in SAM at the time an offer is submitted to be considered for award
  - **Significantly, Applies to All-Small Joint Ventures**
    - Comments to Rule – “JV agreements should be in place more than 48-72 hours in advance of proposal submission, which allows adequate time for completion of registration in SAM.”
    - Create your JV Agreement ASAP (Agreement, EIN, DUNS, Cage Code, etc.)

# Confidentiality Agreements & Requirements

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- **FAR 3.909 – Government prohibited from using appropriated funds for a contract with an entity that restricts employees or subcontractors from reporting waste, fraud, or abuse to a designated investigative or law enforcement representative**
  - **FAR 52.203-18** – By submission of offer, Offeror represents that it will not require employees or subcontractors to sign or comply with confidentiality agreements or statements restricting lawful reporting of waste, fraud, or abuse to a designated investigative or law enforcement representative of a Federal department or agency
  - **FAR 52.203-19** – Implements the above prohibition, and also requires contractor to notify employees that certain agreements have no effect if existing agreements are in place
    - **Designated Investigative or Law Enforcement Representative** – Usually the Agency OIG
  - **Main Point:** Review and update your confidentiality agreements and subcontracts to reference these provisions
    - Include language directly referencing FAR 52.203-18 & 19

# Paid Sick Leave

- **FAR 52.222-62 – Paid Sick Leave Under Executive Order 13706 (Jan. 2017) & FAR 22.21 – Establishing Paid Sick Leave**
  - **Contractor shall permit each employee engaged in performing work on or in connection with government contract to earn not less than 1 hour of paid sick leave for every 30 hours worked**
  - **Application**
    - Typically applies to service contracts covered by the Service Contract Labor Standards statute; the Wage Rate Requirements (Construction) statute (f/k/a Davis-Bacon); concessions contracts; and contracts in connection with federal property that are related to offering services to federal employees or the public
    - No exemptions for contracts below the simplified acquisition threshold or commercial items, but not applicable to COTS items
  - **Contractor is responsible for the compliance of any subcontractor with requirements of E.O. 13706, 29 CFR Part 13, and FAR 52.222-62**
    - FAR 52.222-62 must be flowed down into all subcontracts that are subject to the above-referenced statutes where performance will occur in the United States

# Non-Retaliation for Disclosure of Compensation Information

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- **FAR 52.222-26 – Equal Opportunity (2016)**
  - **August 22, 2018** – FAR Council made final a previous interim rule implementing E.O.13665
    - See 83 Fed. Reg. 42570-01 (Aug. 22, 2018) & 81 Fed. Reg. 67732-01
  - **Amends FAR 52.222-26 to prohibit contractors from discriminating against employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants**
    - **Purpose from E.O. 13665** – “Ensuring that employees of Federal contractors may discuss their compensation without fear of adverse action will enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices, which will contribute to a more efficient market in Federal contracting.”
    - **Typically does not apply to human resources staff** – Typically does not apply to HR staff who have access to compensation information of other employees or applicants as part of their job function, except for special circumstances
      - Contractors can still require H.R. managers to not disclose compensation



# GAO Task Order Protests

- **Final Rule Amending FAR 16.505(a)(10) related to GAO Task Order Protests Under ID/IQ Contracts was Issued on May 1, 2018 (83 Fed. Reg. 19145)**
  - Removed prior sunset of GAO task order protests for agencies other than DOD, NASA, and the Coast Guard
  - Raised threshold for GAO protests of DOD, NASA, and Coast Guard GAO task orders from \$10 million to \$25 million
  - **FAR now clarified to show that GAO has jurisdiction over task/delivery order protests as follows:**
    - **DOD, NASA, Coast Guard** – Jurisdiction only if (1) value of the task order award is at least \$25 million; or (2) the protest is brought on the grounds that the order increases the scope, period or maximum value of the contract
    - **Civilian Agencies (not DOD, NASA, Coast Guard)** – Jurisdiction only if (1) value of the task order award is at least \$10 million; or (2) the protest is brought on the grounds that the order increases the scope, period, or maximum value of the contract

# Cybersecurity

- **FAR 52.204-21 – Basic Safeguarding of Covered Contractor Information Systems**
  - **Requires contractors to implement 15 security controls to covered contractor information systems**
    - **Covered Contractor Information Systems** – an information system that is owned or operated by a contractor that processes, stores, or transmits Federal contract information.
    - **Federal Contract Information** – information, not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public (i.e., public web sites) or simple transactional information, such as necessary to process payments.
  - **Imposes “basic” requirements** – Minimum acceptable standards
  - **Applies to all contracts, except COTS items, including contracts under the Simplified Acquisition Threshold**
  - **Effective June 15, 2016** – A changing area of the law

# Cybersecurity

- **DFARS 252.204-7008 – Compliance with Safeguarding Covered Defense Information Controls**
  - **Certification** – By submitting offer, contractor certifies that it will implement the security requirements specified by National Institute of Standards and Technology (“NIST”) Special Publication (SP) 800-171, “Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations” that are in effect at the time of solicitation
    - <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-171r1.pdf>
  - **Compliance was required no later than December 31, 2017**
  - **Offeror must notify contracting officer if it proposes variations** – If Offeror proposes to vary the NIST SP 800-171 standards, it “shall” submit to the C.O., for consideration by the DOD CIO, a written explanation
  - **Applicable to all contracts that involve “Covered Defense Information,” except for COTS**
  - **Must watch for these provisions in your USACE contracts**
    - See <https://www.mvr.usace.army.mil/About/Offices/Small-Business/Defense-Cybersecurity/> (Good resource providing a high-level explanation of these requirements for small businesses)

# Cybersecurity

- **DFARS 252.204-7012 – Safeguarding Covered Defense Information and Cyber Incident Reporting**
  - **Requires DOD contractors to provide “adequate security” on all Covered Contractor Information Systems**
    - **Adequate Security** – protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information.
    - **Covered Contractor Information System** – an unclassified information system that is owned, or operated by or for, a contractor and that processes, stores, or transmits covered defense information.
    - **Covered Defense Information** – unclassified controlled technical information or other information, as described in the Controlled Unclassified Information (CUI) Registry at <http://www.archives.gov/cui/registry/category-list.html>, that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is – (1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the contractor by or on behalf of DoD in support of the performance of the contract; or (2) Collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract.

# Cybersecurity

- **DFARS 252.204-7012 – Safeguarding Covered Defense Information and Cyber Incident Reporting**

- **NIST SP 800-171 – *Protecting Controlled Unclassified Information in Nonfederal Information Systems & Organizations*** is the required control framework
  - <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-171r1.pdf>
- More than 100 controls organized into security requirement families

Family	Family
Access Control	Media Protection
Awareness & Training	Personnel Security
Audit and Accountability	Physical Protection
Configuration Management	Risk Assessment
Identification and Authentication	Security Assessment
Incident Response	System and Communications Protection
Maintenance	System and Information Integrity

- Some controls require technology solutions, some require policies and procedures

# Cybersecurity

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- **DFARS 252.204-7012 – Safeguarding Covered Defense Information and Cyber Incident Reporting**
  - **“Adequate security” requirements also impose obligations related to cloud computing**
    - Different requirements apply depending on the role of the cloud service provider
  - **Clause must be flowed down into subcontracts for “operationally critical support,” or for which subcontract performance will involve covered defense information**
    - **Operationally Critical Support** – supplies or services designated by the Government as critical for airlift, sealift, intermodal transportation services or logistical support that is essential to the mobilization, deployment or sustainment of the Armed Forces in a contingency operation.
  - **Requires contractors to “rapidly report” (within 72 hours of discovery) cyber incidents to DOD at <http://dibnet.dod.mil>.**
    - **Cyber Incident** – actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

# Cybersecurity

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- **FAR 52.204-23 – Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities**
  - **Section 1634 of 2018 NDAA** – Concerns related to the Russian Government controlling Kaspersky Labs caused Congress and the President to pass a law prohibiting the use of Kaspersky Labs within the U.S. Government
  - **Prohibitions** – prohibits contractors from: (1) Providing any “covered article” that the Government will use on or after October 1, 2018; and (2) Using any “covered article” on or after October 1, 2018, in the development of data or deliverables first produced in the performance of the contract
  - **Covered Article** – essentially means any hardware, software, or service developed or provided by Kaspersky, including components using any hardware or software developed by Kaspersky
  - **Must be flowed down in all subcontracts, including commercial items**
  - **Includes reporting requirements for violations** – <http://dibnet.dod.mil>.

# Cybersecurity

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- **Why is cybersecurity compliance important?**
  - **Presents a legitimate business risk**
    - Government agencies faced 35,000 cyber incidents in FY 2017. GAO Report, “*Urgent Actions Are Needed to Address Cybersecurity Challenges Facing the Nation*,” (July 25, 2018).
  - **Because of the requirements imposed in prime contracts, most subcontracts and teaming agreements also now require compliance**
  - **DCMA recently announced that it will validate DFARS 252.204-7012 compliance when reviewing contractor’s purchasing systems**
  - **Breach of Contract Liability**
    - Failure to comply with FAR 52.204-21 or DFARS 252.204-7008 & 7012 will violate your contract if those clauses are included
  - **Responsibility Issue**
    - Risk of suspension & debarment
  - **False Claims Act Liability**
    - DFARS 252.204-7008 certification could lead to fraudulent inducement liability



# Cybersecurity

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- **Cybersecurity Requirements Are Not Going Away**
  - **If you do not already comply, review your contracts to determine whether requirements are included and create an action plan**
    - Examine the requirements of FAR 52.204-21 and DFARS 252.204-7012 to determine where you need to update your business processes or systems
      - **NOTE:** This presentation does not address every requirement
    - Coordinate with your I.T. Department and external I.T. providers to confirm that your business is in compliance with the NIST SP 800-171 requirements
    - Incorporate Cybersecurity provisions into your Business Code of Conduct and Ethics Policy
      - With cybersecurity issues on the rise and likely to increase, create a culture of compliance by ensuring that all employees know about the importance of cybersecurity
    - Review your own software purchasing policies and also provide notice to subcontractors about prohibitions related to Kaspersky Labs

# Limitations on Subcontracting Rule

- **In 2016 – SBA revised 13 C.F.R. § 125.6 to implement provisions of the FY 2013 NDAA**
  - **Contract for services (except construction)**
    - **Pre-2016** – concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees
    - **Post-2016** – concern will not pay more than 50 percent of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 50 percent subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.
  - **Different formulas**
  - **No mention of “similarly situated” entities before 2016**
    - Similarly Situated – Subcontractor with same small business program status as prime contractor, and is small for the NAICS code that is assigned to the subcontract.
  - **Post-2016 addresses mixed contracts**
    - C.O.’s choice of NAICS code is determinative (only to chosen portion)

# Limitations on Subcontracting Rule

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- **But FAR 52.219-14 – Limitations on Subcontracting was not updated in 2016**
  - **Inconsistent Requirements Between the Regulations and the FAR Clause**
    - FAR 52.219-14 still uses the pre-2016 formula
    - Current regulation at 13 C.F.R. § 125.6 and FAR 52.219-14 impose inconsistent requirements
  - **Which rule do you follow? Both?**
    - SBA regulations, including the All-Small JV regulations at 13 C.F.R. § 125.8 reference 13 C.F.R. § 125.6, not the FAR clause
    - But several contracting officers assert that the FAR clause is a contractual requirement that must be followed, despite the regulations

# Limitations on Subcontracting Rule

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- **Recent Changes are Addressing this Inconsistency**
  - **July 25, 2016** – Veterans Administration (“VA”) issued a Class Deviation that incorporates by reference the SBA regulations at 13 C.F.R. § 125.6 for VA VOSB and SDVOSB contracts
    - [https://www.va.gov/oal/docs/business/pps/deviationVCFP\\_20160725.pdf](https://www.va.gov/oal/docs/business/pps/deviationVCFP_20160725.pdf)
  - **December 3, 2018** – DOD issued Class Deviation 2019-O0003 (amended 1/8/2019) to update FAR 52.219-14 for all new DOD acquisitions
    - The DOD class deviation requires the use of a new FAR 52.219-14 that is consistent with the regulations at 13 C.F.R. § 125.6
  - **December 4, 2018** – FAR Council announced the long-awaited proposed rule
    - Largely makes the FAR and SBA regulations consistent
    - But the proposed FAR clause does not include the “mixed contract” clarification
    - Most expect that the final rule will be issued this year

# Small Business Runway Extension Act

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- **On December 17, 2018, President Trump signed into law the Small Business Runway Extension Act of 2018**
  - **Increases measurement period for calculating average annual receipts (not employee count) for SBA size purposes from 3 years to 5 years**
  - **Different benefits or issues depending on revenue**
    - Several Business with declining revenues that were expecting to be small may now be large for a longer period
    - Several Businesses expecting to grow large will now remain small for longer period
  - **But is it now effective?**

# Small Business Runway Extension Act

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- **SBA Information Notice 6000-180022 (Dec. 21, 2018)**
  - **SBA states that until the SBA changes its regulations, businesses are required to still report their receipts based on the 3 year average**
  - **But does the SBA have the power to delay the wishes of Congress and the President?**
    - “It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.” *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).
    - “When Congress wants to delay a statutory provision so that an agency may implement governing regulations or to otherwise implement the statute, it must do so with clear direction.” *Adkins v. Vilsack*, 252 F. Supp. 3d 588, 600 (N.D. Tex. 2017).
  - **Should talk with a government contracts lawyer about your particular situation**

# WOSB / EDWOSB Certification – Proposed Rule

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- **Background:** FY 2015 NDAA eliminated WOSB self-certification because of potential fraud and oversight issues
  - December 19, 2014 Law – WOSB concern must be certified by:
    - Federal agency;
    - State government;
    - SBA Administrator; or
    - National certifying entity approved by the SBA Administrator
  - However – SBA has failed to enact rules to implement the Law
    - March 2016 – SBA launched <https://certify.sba.gov> and again confirmed that WOSB and EDWOSB self-certification was fine
      - Contrary to the Law?
    - SBA states that self-certification means the WOSB and/or EDWOSB firm has not used a Third Party Certifier, has completed all requirements at [certify.sba.gov](https://certify.sba.gov), and uploaded all the required documents

# WOSB / EDWOSB Certification – Proposed Rule

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- **Proposed Rule issued on May 14, 2019 (RIN 3245-AG75, 84 Fed. Reg. 21256)**
  - Self-certification would finally be eliminated for WOSB / EDWOSB
  - Certification would occur through the SBA (continuing to use <https://certify.sba.gov>), certain other government agencies, or a non-government third party certifier
  - Third Party Certifier Requirements
    - May charge a fee, but must expressly inform that SBA will certify for free
    - Must enter into an agreement with SBA, and will be subject to SBA review
  - Certified WOSB / EDWOSB must recertify every three years
  - If application is denied, cannot apply again for at least 1 year
  - Public Comments are due on July 15, 2019
    - Review at 84 Fed. Reg. 21256, make comments at [www.regulations.gov](http://www.regulations.gov)



# All Small Mentor – Protégé Program

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- **Background:**

- **Before October 1, 2016**

- SBA mentor-protégé program was available only to 8(a) certified contractors
    - SBA mentor-protégé program was not available to any other SBA small business contractor
    - All 8(a) joint venture agreements required direct approval by SBA
    - Some other non-SBA agency mentor-protégé programs

- **After October 1, 2016**

- Launched “All Small” mentor-program on October 1, 2016
    - Expanded mentor-protégé program from only 8(a) small businesses to all small businesses, including WOSB, SDVOSB, & HUBZone small businesses
    - Expanded opportunities for the mentor-protégé exception to affiliation
    - Only 8(a) joint venture agreements still require direct approval by SBA, no others

# All Small Mentor – Protégé Program

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- **Benefits**

- **Opportunity for small businesses to increase business capabilities and growth**
  - Technical and/or management assistance provided by mentor
  - Financial assistance provided by mentor
    - Loans / Equity investment by mentor up to a 40% interest in the protégé
  - Subcontracts – either from the mentor to the protégé, or from protégé to the mentor
  - Trade education
- **Exception to Affiliation**
  - Affiliation may not be found based solely on the mentor-protégé agreement or assistance provided under that agreement
  - If protégé qualifies as small for the procurement, may joint venture as a small business for any government prime contract or subcontract
    - May seek any type of small business contract for which the protégé firm qualifies (i.e., small business set-aside, 8(a), HUBZone, SDVOSB, or WOSB)

# All Small Mentor – Protégé Program

- **Requirements**

- **Must comply with 13 C.F.R. § 125.9 to obtain Mentor-Protégé approval**

- Mentor must be for-profit business demonstrating that it:
  - Is capable of carrying out its responsibilities to assist the protégé firm;
  - Possesses good character;
  - Does not appear on the federal list of debarred or suspended contractors; and
  - Can impart value to a protégé firm due to lessons learned by experience or general knowledge of business operations and government contracting.
- Both entities must be for-profit, be registered in SAM.gov, and complete the SBA's online tutorial for the program. Protégé must also complete business plan.
- Must prepare a mentor-protégé agreement compliant with the regulations at § 125.9

- **JV Agreement must comply with applicable regulations**

- 13 C.F.R. § 125.8 (Small business contracts); 13 C.F.R. § 124.513(c) (8(a) contracts); 13 C.F.R. § 125.18(b)(2) (SDVOSB/VOSB contracts); 13 C.F.R. § 126.616(c) (HUBZone contracts); 13 C.F.R. § 127.506(c) (WOSB or EDWOSB contracts)

# All Small Mentor – Protégé Program

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- **SBA has announced that it expects to consolidate the All Small and 8(a) Mentor-Protégé Programs (RIN: 3245-AG94)**
  - SBA’s intent is to implement the changes that will make it easier for SB concerns to understand and comply with the program’s requirements
  - Predicted Changes:
    - Likely elimination of the 8(a) Mentor-Protégé Program
    - Likely elimination of the pre-approval for 8(a) Joint Venture Agreements
    - Additional clarifications to the terms and requirements for joint venture agreements
      - i.e., whether SDVOSB/VOSB project manager can be a former employee of the mentor who then becomes the employee of the protégé for purposes of the joint venture. See 13 C.F.R. § 125.18

# Section 809 Panel & Small Business

- **Section 809 Panel created by FY 2016 NDAA** (<https://section809panel.org/about>)
  - **Purpose:**
    - (1) Review acquisition regulations applicable to DOD with a view toward streamlining and improving efficiency and effectiveness of the defense acquisition process and maintaining a defense technology advantage; and
    - (2) Make any recommendations for the amendment or repeal of such regulations that the panel considers necessary . . . .
  - **Reporting Requirements:** FY 2016 NDAA required Section 809 Panel to provide interim and final reports to the Secretary of DOD, who then will provide the reports to Congress
    - Panel's first meeting was on Sept. 30, 2016
    - Has published 3 volumes of its report between March 2018 and January 2019
    - Has proposed 98 recommendations, some with multiple sub-recommendations
  - **Recommendations are being implemented into law**
    - Several Section 809 Panel recommendations were passed into law through the FY 2019 NDAA

# Section 809 Panel & Small Business

- **Section 809 Panel Recommendation 35**
  - **Section 809 Panel recommends eliminating SBA Small Business Set-Asides for most DOD acquisitions**
    - [https://section809panel.org/wp-content/uploads/2019/02/Recommendation\\_35.pdf](https://section809panel.org/wp-content/uploads/2019/02/Recommendation_35.pdf)
  - **Recommends replacing SBA Small Business Set-Asides with a 5% price preference only for evaluation purposes**
  - **Would eliminate the current “Rule of Two” under FAR 19.502-2**
    - The contracting officer shall set aside any acquisition over \$150,000 for small business participation when there is a reasonable expectation that –
      - (1) Offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns (see paragraph (c) of this section); and
      - (2) Award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists (see 19.502-3 as to partial set-asides). . . .
    - Also would eliminate the requirement (subject to the C.O.’s reasonable expectations of obtaining offers) for small business set-asides for procurements exceeding \$3,500, but not over \$150,000. See FAR 19.502-2(a).

# Section 809 Panel & Small Business

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- **Recommendation 35**

- **Would eliminate any preference for socio-economic categories (HUBZone, WOSB, 8(a), SDVOSB, etc.) for DOD commercial purchases**

- **Section 809 Panel’s Rationale for Eradicating Set-Asides**

“Small business policies, which are focused on meeting quotas through indiscriminate set-asides and reservations, are not benefiting DOD or small businesses in a way that ensures DOD has access to a robust, innovative, and globally competitive small business vendor-base.”

# Section 809 Panel & Small Business

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- **Main Point About Section 809 Panel**
  - **Several of the Section 809 Panel's recommendations have already been made into law and others will be**
  - **Contractors should review the Section 809 Panel's Reports (or summaries of them) to see how they may impact your business**
  - **If you have concerns about the recommendations, speak up about them**
    - The recommendations are provided to Congress
    - Several have already been adopted into law



# Questions

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