

Small Business Summit

November 19, 2024



THE COALITION
FOR GOVERNMENT PROCUREMENT

Agenda

1. SBA Regulatory Update, Chris Clarke, Attorney-Advisor, SBA Office of General Counsel and Alison Amman, Attorney-Advisor, SBA Office of General Counsel
2. SBA's Process for Reviewing Individual Waivers and Class Waivers of the Nonmanufacturer Rule - Chris Clarke, SBA Attorney, will provide a refresh of the nuts-and-bolts of pursuing and securing NMR waivers.
3. Enforcing Workshare Requirements under Teaming Agreements, Subcontracts, and Joint Venture Agreements – Panel discussion with Committee co-chairs, David Black, Partner at Holland & Knight; Jon Williams, Partner at Piliero Mazza and, Moderator Jim Wrigglesworth, Vice President of Wrigglesworth Enterprises.
4. Upcoming Events
 - A. Fall Training Conference: *The 2025 Federal Market: What's Next?*, November 20-21
 - B. Coalition Holiday Party

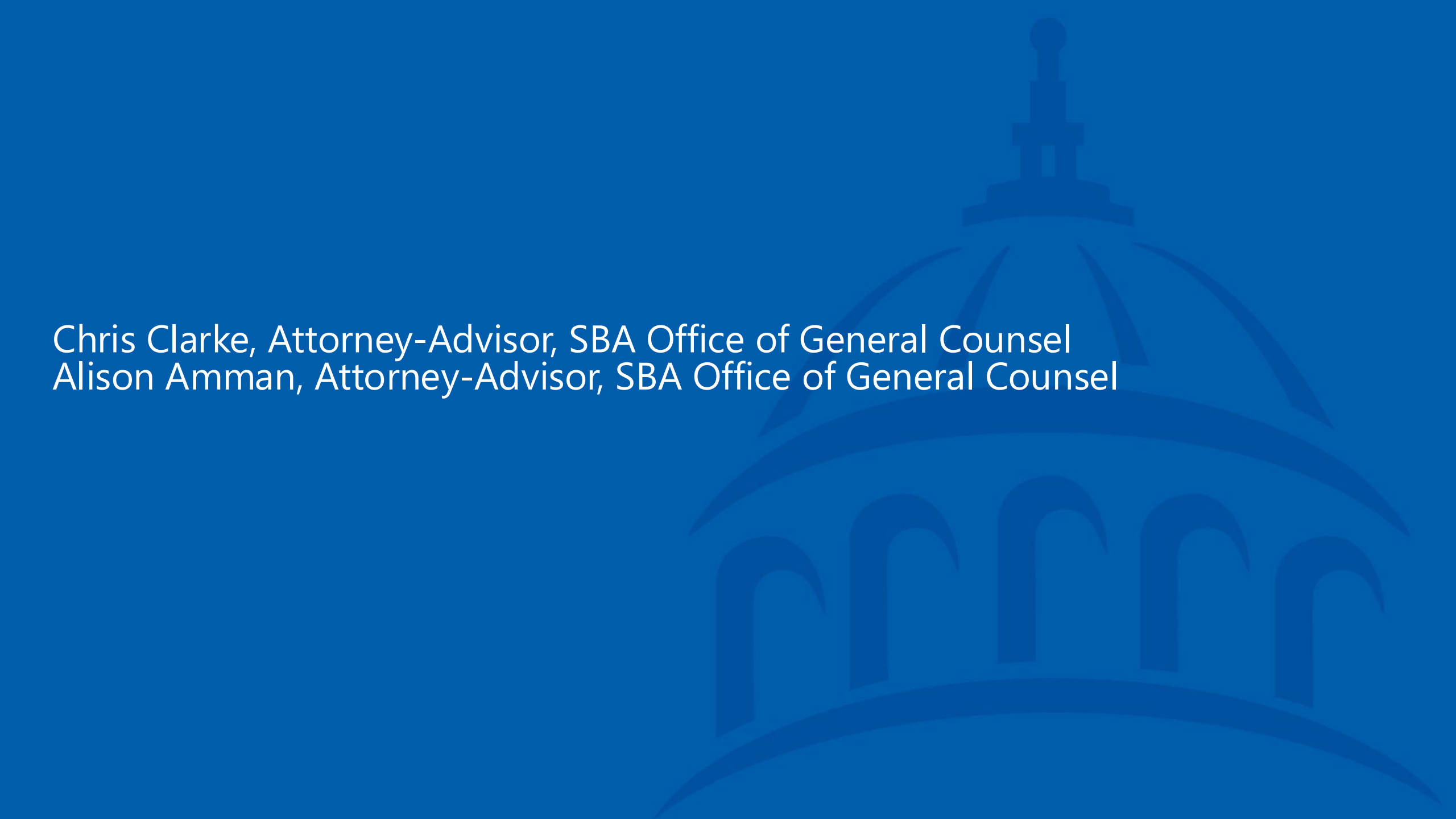
Antitrust Policy

Coalition members work together to advocate for common sense acquisition and dialogue with government leaders through the committees. The Coalition unequivocally complies with the policy of competition required by applicable antitrust laws in these efforts.

To review our antitrust policy, click [here](#).



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Chris Clarke, Attorney-Advisor, SBA Office of General Counsel
Alison Amman, Attorney-Advisor, SBA Office of General Counsel

A large, stylized, light blue dome graphic is positioned on the right side of the slide, extending from the top to the bottom. It features a central finial and a series of arched windows or openings along its base.

Chris Clarke, Attorney-Advisor, SBA Office of General Counsel



U.S. Small Business
Administration



Understanding the Nonmanufacturer Rule

Association of Procurement Technical Assistance Centers (APTAC)

Procurement Technical Assistance Centers are a vital resource partner.

- APTAC posts past “First Wednesday” programming at this link: <http://www.aptac-us.org/for-contracting-officers-sba-webinar-library/>
- Contracting officer resources: “How PTACs partner with federal agencies”: <http://www.aptac-us.org/federal-partners/>
- Find your nearest Procurement Technical Assistance Center at <http://www.aptac-us.org>

Today's Speakers

Christopher Clarke
Attorney Advisor
Office of General Counsel
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Overview

- The Nonmanufacturer Rule (NMR)
- Applicability of the NMR
- Individual Waivers to the NMR
- Class Waivers to the NMR

The Nonmanufacturer Rule

Purpose

The Nonmanufacturer Rule (NMR) allows an otherwise responsible business concern to be awarded a procurement contract to supply a product – even though it is not the manufacturer or processor of the product – as long as it meets certain conditions

Conditions

To qualify as a small nonmanufacturer, a firm:

- Cannot exceed 500 employees;
 - Must be primarily engaged in retail or wholesale and normally sells type of product being supplied;
 - Must take ownership or possession of the item(s) in a manner consistent with industry practice; **and**
 - Must supply the end product of a small business, 8(a), WOSB, EDWOSB, HUBZone, or SDVOSB manufacturer or processor made in U.S. **or**
-
- Obtain a **waiver** to the NMR

13 C.F.R. § 121.406(b)(1)

Manufacturer defined

- The manufacturer of an item is the concern which performs the primary activities in transforming organic or inorganic substances, including the assembly of parts and components, into the end item being acquired
- Firms which only perform minimal operations on the end item or firms which add substances, parts, or components to the end item do not qualify as the manufacturer of the item being acquired e.g. assembled container

13 C.F.R. § 121.406(b)(2)(i)(b)

Applicability of the NMR

Applicability of the NMR

- Small business set-asides above the simplified acquisition threshold
- Set-asides under the following above the micropurchase threshold:
 - 8(a)
 - SDVOSB
 - WOSB
 - EDWOSB
 - HUBZone
- Against a manufacturing or supply contract
- Above the relevant dollar amount thresholds

13 C.F.R. § § 121.406(a) & (d)

Dollar Thresholds

- NMR continues to apply above the micropurchase threshold for set-aside awards under the socioeconomic groups mentioned above
- NMR applies to small business set-aside awards above the SAT (does not apply to small business set-asides between micropurchase threshold and SAT)
- NMR does not apply to subcontracts or full-and-open contracts

NMR Applicable NAICS Codes

The NMR only applies to manufacturing and supply acquisitions with certain assigned NAICS codes:

- 31XXXX-33XXXX
- 511210 (software but does not include subscription or remote software)
- 541519 footnote 18 (Information Technology Value Added Reseller – ITVAR that meets the 150 employee limit)

Individual Waivers to the NMR

Standard for Individual NMR Waivers

- Individual waivers apply only to a single solicitation (one-time waiver) and the **specific item(s)** identified in the waiver request
- SBA will grant an individual waiver to the NMR after determining that “no small business manufacturer or processor can reasonably be expected to supply the product meeting the specifications of the solicitation”

13 C.F.R. §121.406(b)(5)(i)

Procedure for Requesting an Individual NMR Waiver

- The contracting officer must email the request to the SBA Office of Government Contracting at nmrwaivers@sba.gov
- The request should include all the elements noted on the following slide

Individual NMR Waiver Request Checklist

- ✓ Proposed solicitation number or other ID
- ✓ Estimated total dollar amount of the contract
- ✓ Assigned manufacturing or supply NAICS code(s) for the solicitation
- ✓ Brief statement of the procurement history
- ✓ For contracts over \$500,000 provide a Statement of Work (or equivalent such as Product Description)
- ✓ A definitive statement of the item(s) to be waived and justification for why they are required
- ✓ A narrative describing market research and supporting documentation
- ✓ Request signed by the contracting officer

13 C.F.R. § 121.1204(b)(1)

Definitive Statement of Item(s)

- SBA needs the items sought under the solicitation to be described in terms of their qualities and attributes
- This could include laymen's terminology, technical specifications, or any other identifying characteristics
- SBA will generally not grant an individual NMR waiver if the primary justification for the narrowing of sources is to obtain a brand name item

“Brand Name Only” Procurements

- However, if the requesting agency has a legitimate need for a particular brand name item, then the contracting officer must provide a Limited Sources Justification (LSJ), J&A, or equivalent document
- This document must include the reason the brand name item is essential to the procurement and it must comply with all relevant FAR requirements

FAR 6.302, 6.303, 6.304, 8.40, FAR 16.

Market Research Considerations

Market Research is the most important part of the individual waiver request

- SBA needs to see a narrative and documentation that provides reasonable certainty that there are **no** small business manufacturers that make and could supply the items sought
- This requires the contracting officer to perform extensive market research and provide a **clear description** of that market research

Market Research Considerations (cont.)

- Examples of market research tools:
 - Sources Sought Notice (or RFI) that includes language specifically seeking small business manufacturers
 - DSBS/SAM searches for potential small business manufacturers (with follow up)
 - Recently held industry days and roundtable discussions
 - Direct correspondence with small businesses identified via Sources Sought, RFI, DSBS search, OSBDU, past procurements, etc.
 - Repetitive acquisitions when based on sufficient recent, thorough market research showing no change in the market.

Market Research Considerations (cont.)

- In most cases, the Sources Sought Notice (or RFI) is the most effective market research tool
 - It reaches the entire Federal procurement community and puts potential small business manufacturers on notice
- SBA requires that a Sources Sought/RFI:
 - Include language specifically seeking small business manufacturers; and
 - Define the item(s) in terms of salient characteristics
- SBA prefers the RFI to be posted on FedBizOpps for 14 calendar days

Notice of Waivers

- Potential offerors must be notified of class or individual waivers at the time of solicitation
- Notification of offerors after the solicitation is permissible only if potential offerors are afforded additional time to respond

13 C.F.R. §121.1206(a)

Multi-Item Procurements

- NMR waivers are applied on an item-by-item basis. Thus, contracting officers must provide distinct justification and market research for each item for which a waiver is requested
- Potential offerors should be notified of which items are covered by the waiver
- However, an NMR waiver is not necessary for every item manufactured by a large business in a multi-item procurement

Multi-Item Procurements (cont.)

Paths to compliance with the NMR for multi-item procurements:

- At least 50% of the total estimated contract value manufactured by small business

13 C.F.R. § 121.406(e)(1) & 13 C.F.R. § 125.6(a)(2)(ii)(A)

- Over 50% of the total estimated contract value manufactured by large business, obtain NMR waivers so that 50% of the *remaining* total value (items not covered by NMR waiver) is manufactured by small business

13 C.F.R. § 125.6(a)(2)(ii)(B)

- On a multi-item procurement involving a manufacturer and nonmanufacturer the size standard applied is that of the manufacturer.

Multi-Item Procurement Examples

Example – Total contract value of \$1 million. \$500k manufactured by small business.

- **Result:** Complies with NMR. 50% of total contract value is manufactured by small business (no waivers needed)

Class Waivers to the NMR

Standard for Class NMR Waivers

A class waiver is justified when **no** small business manufacturers are

- **available to participate**
- in the **federal market**
- for a **class of products**

13 C.F.R. §121.406(b)(5)(ii)

“Class of Products”

- “Class of products” refers to an individual subdivision within a NAICS Industry Number
- For practical purposes, SBA uses a combination of NAICS code, PSC, **and** a description to identify the “class of products” for a class waiver to the NMR
 - E.g. NAICS 333333, PSC 1234, description

“Available to Participate”

- “Available to participate” means that small business contractors have performed, been awarded, or submitted an offer on a federal government contract/solicitation for the class of products within last 24 months
 - **13 C.F.R. § 121.1202(c)**
- If just **one** small business manufacturer has been awarded or submitted a bid for a solicitation concerning the class of products in question over the previous 2 years, the class waiver request must be denied

Procedures for Requesting and Establishing a Class Waiver

- Any government agency (including the SBA), business association, or interested party may request a NMR waiver for a class of products
- The class waiver request must include
 - A statement of the class of products to be waived (NAICS code, PSC, description)
 - **Detailed** information on efforts to identify domestic small business manufacturers for the class of products

13 C.F.R. § 121.1204(a)(1-3)

Class Waiver Procedure (cont.)

- SBA will then conduct its own market research to confirm whether any small business manufacturers were awarded a contract on the class of products within the prior 24 months
- If no small business manufacturers are found initially, SBA will:
 - 1) Publish notices in FedBizOpps and the Federal Register announcing intent to establish class waiver
 - 2) Allow (at least) 15 day public comment period
 - 3) Publish final notice of class waiver in the Federal Register if no small business manufacturers are identified after public comment period

13 C.F.R. § 121.1204(a)(4)

Procedures for Reviewing and Terminating Class Waivers

- A class waiver to the NMR has no time limitation
- Discovery of just **one** small business manufacturer will trigger termination of the class waiver
 - Notice in the Federal Register of intent to terminate class waiver, public comment period, final FR notice

13 C.F.R. § 121.1204(a)(7)

Existing NMR Class Waivers

- Existing NMR class waivers can be found at the following link:

<https://www.sba.gov/contracting/contracting-officials/non-manufacturer-rule/class-waivers>

- Make sure to keep track of class waiver terminations and always check the list for up-to-date effective class waivers before issuing a small business set-aside

How to Submit NMR Waiver Requests

- Submit NMR waiver requests and attachments to the NMR program email address at: nmrwaivers@sba.gov
- For individual waivers, use the solicitation number (or equivalent) and agency abbreviation in the subject line for efficient identification of each case
 - e.g. SBA SBA123-18-Q-0001 NMR Waiver Request
- For class waivers, use the NAICS code, PSC, and a description of the product in the subject line
 - e.g. NAICS 333333, PSC 1234, Widgets

How to Submit NMR Waiver Requests (cont.)

- The waiver applies to a one-time award
- It does not apply to modifications outside the scope of the contract or other procurement actions.
- The effect of a waiver is to allow an otherwise qualified small business to supply the product of an other-than-small manufacturer or processor on an intended small business set-aside contract.
- However, it must be emphasized that this waiver of the NMR **does not waive other legal requirements** applicable to Government procurements, such as the Buy American Act and the Trade Agreements Act.



David Black, Partner at Holland & Knight

Jon Williams, Partner at Piliero Mazza

Moderator Jim Wrigglesworth, Vice President of Wrigglesworth Enterprises

Upcoming Events



Coalition Meetings and Events

- November 20 and 21, Fall Training Conference
 - Fairview Park Marriot, Falls Church, VA
 - Still time to register
- December 17, Coalition Holiday Party
 - Tyson's Tower Club, Vienna, 5:00 - 8:00 pm (ET)
 - Complimentary for members but please member to register
- Reminder if you have comments or feedback on the Rule of Two or Vendor Compliance Scorecard, please submit them to Joseph Snyderwine at Jsnyderwine@thecgp.org.

Thank you

