2023 Small Business Regulatory Year in Review

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THE COALITION
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Agenda

1. **2023 Legislative and Regulatory Developments** (Ken Dodds)
2. **Notable Protests and Court Rulings in 2023** (Jon Williams)
3. **2023 Highlights from SBA's Office of Hearings and Appeals** (David Black)

2023 Legislative and Regulatory Developments

SBA Final Rule 88 FR 26164, effective May 30, 2023

- Joint Ventures
- Orders are not contracts for purposes of SBA’s joint venture rule which provides that a joint venture can receive an unlimited number of contract awards within a two-year period after the first contract award. 13 CFR 121.103(h).
- Joint ventures can be populated with employees where the parties to the joint venture are similarly situated with respect to the type of set-aside contract, but the firm’s employees/revenues in the aggregate must meet the relevant size standard (in contrast with unpopulated joint ventures where each member of the joint venture must individually meet the size standard). 13 CFR 121.103(h)(1).
- Members of unpopulated joint ventures must include in their own size calculation the receipts or employees of the joint venture based on work share. Members of populated joint ventures must include in their own size calculation the receipts or employees of the joint venture based on the ownership percentage of the joint venture. 13 CFR 121.103(h)(4).

SBA Final Rule

- Joint Ventures
- A joint venture minority member’s consent can be required to initiate litigation or pursue contract opportunities on behalf of the joint venture. 13 CFR 125.8(b)(2)(ii)(A).
- A firm cannot be a member of more than one joint venture pursuing a specific 8(a)/HUBZone/SDVO/WOSB/EDWOSB set-aside contract. 13 CFR 124.513(a), 126.616(a)(2), 127.506(a)(3), and 128.402(a)(3).
- ISOO Joint Notice 2024-01: Joint Ventures and Entity Eligibility Determinations, October 5, 2023

SBA Final Rule

- 8(a) waivers of termination for convenience
  - Requests submitted directly to the head of the 8(a) program instead of the District Office
  - Time limit of 90 days to review the waiver request.
  - SBA deleted requirement that the acquiring concern have experience performing the type of work performed by the acquired concern. 13 CFR 124.515.
- Change of ownership for former Participant. 13 CFR 124.105(i).
- 8(a) sole source
  - A firm must be small and in the 8(a) program at the time of award of an 8(a) sole source order.
  - 13 CFR 121.404(a)(1)(i)(B), 121.404(a)(1)(ii)(B), 124.501(h), 124.502(a), 124.503(i)(1)(iv).
- Agencies can use FSS procedures to award competitive 8(a) orders. 13 CFR 124.503(i)(2)(ii).

SBA Final Rule

- Ostensible Subcontractor Rule
- All aspects of the relationship are considered
- The proposal (such as contract management, transfer of the subcontractor's incumbent managers, technical responsibilities, and the percentage of subcontracted work)
- Agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement)
- Whether the subcontractor is the incumbent contractor and is ineligible
- Whether the prime contractor relies solely on the subcontractor's experience because it lacks any relevant experience of its own.
- No one factor is determinative. 13 CFR 121.103(h)(3)(i).
- A prime contractor may use the experience and past performance of a subcontractor to enhance or strengthen its offer, including that of an incumbent contractor. 13 CFR 121.103(h)(3)(ii).

SBA Final Rule

- Ostensible Subcontractor Rule
- If a firm and its similarly situated subcontractors are meeting the limitations on subcontracting, a firm cannot be found to be affiliated with a large business subcontractor under the ostensible subcontractor rule. 13 CFR 121.103(h)(3)(iii).
- SBA declined to include hiring a large number of the incumbent's personnel as a factor under the ostensible subcontractor rule, since that is often the government's desire and sometimes legally required. 88 FR 26164, 26166.
- Clarifications on review whether a HUBZone or WOSB/EDWOSB is unduly reliant on a non-eligible subcontractor to perform the primary and vital parts of a HUBZone or WOSB/EDWOSB contract. 13 CFR 126.801(e)(2) and 127.603(d)(2).
  - OHA reviews SDVO protests. 13 CFR 134.1003(c).

SBA Final Rule

- SBIR
- Where an SBIR awardee is affiliated with a subcontractor under the ostensible subcontractor rule the parties will be treated as a joint venture and therefore must comply with the SBIR rules applicable to joint ventures. 13 CFR 121.702(c)(7).
- The exemption from affiliation applicable to Small Business Investment Companies applies to SBIR/STTR as well. 13 CFR 121.702(c)(11).
- Recertification
- Recertification is not required where an acquisition does not result in a change of control or negative control. 13 CFR 121.404(g)(2)(i).
- Adding orders and agreements to rule providing firm is not eligible for award if recertify as large within 180 days after offer but prior to award. 13 CFR 121.404(g)(2)(iii).

SBA Final Rule

- Nonmanufacturer Rule
- Where SBA has granted a waiver of the non-manufacturer rule for a contract with a duration of greater than five years, the contracting officer must request a new waiver after five years.
  - 13 CFR 121.1203(e).
- A contract must be awarded within one year of the date of SBA's waiver of the non-manufacturer rule. 13 CFR 121.1204(b)(5).
- For a multiple item procurement, no waiver required if 50% of items are small.
  - 13 CFR 121.406(d)(1).
- a waiver must be sought and granted for each item that the procuring agency believes no small business manufacturer exists, so that the total value of items to be procured from small business or subject to a waiver to at least 50% of the estimated value of the contract.
  - 13 CFR 121.1203(f).

SBA Final Rule

- Combined Set-Asides
- Agencies cannot issue solicitations that limit competition to multiple socio-economic categories or give evaluation credit for additional socio-economic categories beyond the designated set-aside.
  - 13 CFR 124.501, 126.609, 127.503(e), and 128.404(d).
- Limitations on Subcontracting
- For multi-agency set-aside contracts, the limitations on subcontracting will apply to each order. 13 CFR 125.6(d).
- Mentor Protégé
- A protégé can use its second opportunity to have mentor by extending its time with its first mentor for an additional six more years.
  - 13 CFR 125.9(e)(6)(iv).

OMB Memo Increasing SB Participation on MACs, January 25, 2024

- Engage PCR and OSDBU if SB participation on MAC will be less than 30 percent
- Consider on-ramps
- Discourage off-ramps
- Apply Rule of Two to Orders, Document Market Research, Notify OSDBU and PCR
- Maximize SB under the SAT
- Do Not Prioritize BICS over Small and Socioeconomic Goals
- Use Socioeconomic set-asides to get Tier II Spend Under Management Credit
- New Entrants, Contracting Base, Federal Supplier Dashboard, Procurement Equity Tool, DSBS
- Does not include FSS

FAR 8(a) Final Rule

- Basic Ordering Agreements (BOAs) and Blanket Purchase Agreements (BPAs) are not contracts, so SBA is requiring offer and acceptance of each order under the BOA/BPA
- SBA will not accept a sole source order if the cumulative value of the orders under the BOA/BPA exceed the competitive threshold
- SBA will not accept new orders if the 8(a) concern has left the 8(a) program or is no longer small
- A concern must be in the 8(a) program at the time of an 8(a) sole source award.
- SBA Administrator may appeal a contracting officer's decision that a requirement is "new" and therefore not subject to the rule that once a requirement is in the 8(a) program it must remain in the 8(a) program unless SBA releases it.

FAR 8(a) Final Rule

- When a contracting officer determines that a requirement previously procured through the 8(a) program is “new,” the contracting officer must provide written notice to the SBA District Office and the relevant Procurement Center Representative (PCR).
- If an agency intends to procure the follow-on to an 8(a) contract as an 8(a) order under an existing multiple award contract, the contracting officer must provide written notice to the SBA District Office, PCR and incumbent 8(a) concern.
- With respect to mandatory sources, the contracting officer “should” provide written notice to the head of the 8(a) program of his or her intent to use a mandatory source for a follow-on to an 8(a) requirement.
- Certificate of Competency program does not apply to 8(a) sole source.
- 88 FR 69523, effective November 6, 2023.

FAR Proposed Rules to Require Size and Status Recertification on Orders and Protest of Such Orders

- On September 29, 2023, the FAR Council issued a proposed rule to implement SBA's final rule which requires size and status recertification on orders set aside for small or other socioeconomic categories where the size or status was not relevant for the underlying contract. 88 FR 67189.
- On October 3, 2023, the FAR Council issued a proposed rule to implement several SBA final rules concerning size and status protests in connection with orders under multiple award contracts.

  88 FR 68067.
- SBA is already following its regulations when issuing size protest and appeal decisions.
- *See Size Appeal of Avenge, Incorporated*, SBA No. SIZ-6178 (2022); *Size Appeal of Potomac River Enterprise Solutions, LLC*, SBA No. SIZ-6138 (2022).

Credit for Lower Tier Subcontracting SBA Final Rule

- Large business prime contractors that have individual small business subcontracting plans may claim credit for subcontracts with small businesses at tiers below the first tier.
- Implements a 2019 amendment of the Small Business Act. Section 870 of Pub. Law No. 116-92.
- Prior 2016 SBA final rule. 81 FR 94246.
- Prior 2013 amendment of the Small Business Act. Section 1614 of Pub. Law No. 113-66.
- SBA's new final rule prohibits procuring agencies from setting separate small business subcontracting goals at the first tier and at lower tiers and makes clear that large business prime contractors may choose whether to report their small business subcontracting plan goal achievement utilizing lower tier subcontractors. What is unknown is whether procuring agencies will allow prime contractors to follow SBA's final rule prior to implementation in the FAR.
- 88 FR 70339, Effective November 13, 2023.
- FAR Case RIN 9000-AO57, Credit for Lower-Tier Subcontracting.

FAR Final Rules and Size Standards

- FAR Accelerated Payments
- Pay small business primes or large primes who agree to pay small subs within 15 days. 88 FR 9730, effective March 16, 2023.
- SBA Employee Based Size Standards
- Increased 144 employee-based size standards and left other employee-based size standards at the existing level. Of note, SBA retained the Nonmanufacturer size standard of 500 employees. 88 FR 9970, effective March 17, 2023.
- FAR Final rules on status protests, 8(a) recertification on long-term contracts
- Protest HUBZone, SDVO, or WOSB/EDWOSB is unduly reliant on an ineligible concern for performance, i.e., not a similarly situated an entity.
- 8(a) firm must be in the 8(a) program within 120 days of the end of the fifth year of the 8(a) contract for the agency to exercise the option. 88 FR 9734, effective March 16, 2023.

Notable Protests and Court Rulings in 2023

GAO Protest Statistics from FY23

- Total number of protests was up 22% in FY23 compared to FY22
  - The total had steadily declined each year from FY19 to FY22
- Sustain rate was 31% compared to between 13-15% in FY19-FY22
  - GAO sustained more than 100 CIO-SP4 protests in FY23
  - Without the CIO-SP4 protests, GAO's sustain rate would have been similar to its sustain rates in FY19-FY22
- In FY23, the top successful protest issues were unreasonable technical evaluation, flawed selection decision, and unreasonable cost or price evaluation

Kupono Gov't Servs., LLC, et al., B-421392.9 (June 5, 2023)

- Protesters challenged cost and non-cost evaluations
- Agency decided to take corrective action to obtain revised cost proposals and make a new award decision
- Subsequent protest challenged the corrective action as improperly limited to revised cost proposals
- GAO found:
  - Agencies have broad discretion in taking corrective action
  - However, GAO sustained the protest because changes in cost proposals would impact technical proposals and agency may not prohibit offerors from revising areas of the proposal materially impacted by the corrective action

Systems Plus, Inc., et. al., B-419956.184, et. al. (June 29, 2023)

- GAO sustained 93 – yes 93! – protests and supplemental protests challenging exclusions from the competition for the CIO-SP4 procurement
  - A few weeks after issuing the Systems Plus ruling, GAO sustained 29 more CIO-SP4 protests in Phoenix Data Security, Inc., et al., B-419956.200 et al. (July 10, 2023)
- Agency's responses to GAO were conflicting and incomplete
  - Record did not show the agency had validated all of the proposals IAW the Solicitation before determining the cutlines needed to remain in the competition
- GAO recommended the agency perform "hard" validation on all self-scores and make new cutlines
  - New exclusions decisions were recently announced to offerors, meaning the next wave of CIO-SP4 protests is getting started

Washington Business Dynamics, LLC, B-421953; B-421953.2 (Dec. 18, 2023)

- Agency challenged whether WBD was an interested party to file the protest based on SBA's very complex size recertification rules in 13 C.F.R. 121.404(g)
- The procurement at issue was an FSS BPA limited to SDVOSBs
- The agency and intervenor argued that WBD was not an interested party because it was no longer an SDVOSB
  - WBD was an SDVOSB when it first received its FSS contract and when it submitted its quote for the BPA, but 147 days after submitting its quote it was acquired by a non-SDVOSB
  - Pursuant to FAR 52.219-28, WBD notified the agency that it was no longer an SDVOSB

WBD, cont'd

- GAO found:
  - SBA's size recertification rules required WBD to recertify its size on its FSS contract and an incumbent BPA with the agency
  - However, SBA's rules did not require WBD to recertify its size in connection with its pending quote for the BPA at issue in the protest
  - It is "not apparent" that a corporate transaction that requires recertification at the FSS contact level automatically triggers recertification for any pending quotations for a BPA or order issued under the FSS contract
- Takeaway: the recertification rules are very confusing and should be carefully considered in planning for any acquisitions involving contractors with set-aside contracts

Defense Integrated Solutions v. United States, 165 Fed. Cl. 352 (2023)

- Started with a ruling from the SBA OHA in September 2022 that found an SDVOSB joint venture ineligible for award following a protest by DIS
  - OHA found a single provision in the joint venture agreement ("JVA") that required both parties to agree before the JV initiated a claim or litigation gave too much control to the non-SDVOSB JV partner
- SDVOSB challenged OHA's ruling at the COFC and DOJ/SBA switched sides, agreeing with the SDVOSB and sought remand to OHA for a new decision
- In January 2023, OHA issued a new decision
  - This time, OHA found the unanimous consent requirement was permissible because it did not affect the SDVOSB's control over the day-to-day management and administration of the JV's contractual performance

DIS, cont'd

- After losing the 2nd OHA decision, DIS challenged it to the COFC
- COFC upheld OHA's ruling that the JVA provision requiring both JV partners to consent before the JV initiates litigation or claims does not prevent the SDVOSB from being the JV's managing venturer
- SBA subsequently revised its JV regulations to explicitly permit this unanimity requirement

LS3, LLC v. United States, 168 Fed. Cl. 722 (2023)

- Like DIS, this was another case involving a challenge to OHA's decision regarding a JVA
- COFC upheld OHA's ruling that the JVA did not comply with the set-aside JV rules because the non-SDVOSB JV partner had too much control over the JV's management committee
- DIS and LS3 are just two of an increasing number of cases at OHA and COFC involving JVAs
  - It is critical to carefully prepare your JVA following the latest SBA rules and case law
  - You need to ensure your JVA addresses all of the SBA requirements for each contract the JV pursues before the JV submits its proposal for the contract

Consolidated Safety Services, Inc. v. United States, 167 Fed. Cl. 543 (2023)

- COFC overturned OHA's NAICS code designation
  - An interested party can appeal a NAICS code designation in a solicitation to OHA
  - OHA is supposed to review the NAICS code definitions and the requirements of the contract to determine if the CO made a clear error in choosing the designated NAICS code
- COFC held:
  - OHA made several errors, including by not correctly analyzing the solicitation when it found an R&D code would be improper despite the fact that more than 85% of the labor hours are for PWS tasks that primarily involve R&D
  - The NAICS code OHA selects must "best describe" the principal purpose of the acquisition

SH Synergy, LLC v. United States, 165 Fed. Cl. 745 (2023)

- Pre-award protest against Polaris procurement
- COFC found that GSA could prohibit mentors from submitting proposals as part of multiple JVs
- However, COFC found the solicitation violated 13 C.F.R. 125.8(e) because it would apply the same evaluation criteria and scoring table to the protégé’s experience as part of a JV as would be applied to all offerors generally
- COFC also found the solicitation violated federal law because it did not feature task orders based on hourly rates, and did not include a price evaluation factor
  - Congress may soon change the law that led to this ruling

Ultima Servs. Corp. v. U.S. Dep't of Agric., No. 2:20-CV-0041-DCLC-CRW (E.D. Tenn. July 19, 2023)

- Declared SBA's rebuttable presumption of social disadvantage for the 8(a) program violated Ultima's Fifth Amendment rights and enjoined SBA from using the presumption
  - This immediately threw the 8(a) program into limbo, with major questions for pending applicants, pending awards to current participants, and how SBA would handle the program going forward
- While the court battle continues, SBA has made key changes to the 8(a) program
  - Current participants admitted under the presumption had to submit a narrative of social disadvantage for approval
  - New applications for individually-owned firms require demonstration of social disadvantage by a preponderance of the evidence

United States ex rel. Bid Solve, Inc. v. CWS Mktg. Grp., Inc., No. 1:19-CV-1861-TNM (D.D.C. May 18, 2023)

- False Claims Act case involving question of whether a small business' tax returns complied with SBA's regulations for determining small business status
- Court found:
  - A firm cannot use its tax returns to skirt SBA requirements
  - SBA's regulation at 13 C.F.R. 121.104(a) provides how receipts are calculated for small business purposes
  - Firm in question had used an accounting method to exclude "flow through" income from its revenues reported to IRS, but this was not among the revenue exclusions permitted in 13 C.F.R. 121.104(a) for determining small business status

2023 Highlights from SBA's Office of Hearings and Appeals

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New OHA Jurisdiction over HUBZone Status Appeals

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- **Effective May 10, 2023**: OHA has new jurisdiction to hear appeals from HUBZone status protests
- **OHA's Rules of Practice** for HUBZone Appeals: 13 CFR 124.1301 *et seq.*
- **Appeal Deadline**: 10 business days from HUBZone status protest determination
- **Impact of Appeal on Procurement**
  - Pre-Award: CO must withhold award until OHA issues decision, unless CO determines award and performance is in best interests of Gov't
  - Post-Award: CO must consider whether to suspend performance until OHA issues decision

New OHA Jurisdiction over HUBZone Appeals

- **OHA issued <u>two</u> HUBZone status appeal decisions in 2023**
  - *HUBZone Appeal of: New Source Corp.*, SBA No. HUB-101 (dismissing appeal of appellant's <u>decertification</u> from the program because it was <u>unrelated to any protest</u> and therefore outside of OHA's jurisdiction).
  - *HUBZone Appeal of: PAE Applied Technologies LLC*, SBA No. HUB-102 (dismissing appeal as moot after it was withdrawn by appellant)
- ***Expect more substantive HUBZone appeal decisions from OHA in 2024!***

2023 Highlights from SBA's Office of Hearings and Appeals

Affiliation Cases

Affiliation and De-Affiliation

- **Who Controls: the Board or the Majority Shareholder?**
  - **Appellant's Board** had four Directors in two blocks: (1) a father and son from one family and (2) a husband and wife from another family.
  - **Quorum of the Board** was More than 51% of Directors. Either block of Directors could prevent a quorum for purposes of conducting business
  - **But Majority Shareholder** owned 51% and could unilaterally call meetings of the shareholders and unilaterally remove and replace Directors from the Board.
  - **Area Office**: Appellant was affiliated with the husband-wife's other businesses because they had the power to block action by the Board
  - **OHA *Reversed***: Where a **majority shareholder** has the power to call a shareholders meeting and, at that meeting, to remove any and all directors with or without cause, it is the majority shareholder, not the directors, who controls the firm, and any **control by the directors** is illusory.

Size Appeal of: Transox, Inc., SBA No. SIZ-6218

Affiliation and De-Affiliation

- **A Successful "De-Affiliation"**
  - **2018:** SBA finds GSL (the awardee) **was "large" because affiliated with** TriMark based on TriMark's negative control resulting from its minority ownership interest in GSL
  - **2018:** Corporate **reorganization** by GSL: TriMark relinquished its interest in GSL
  - **2019**: **SBA recertified** GSL as "small"
  - **OHA agreed that GSL had successfully disentangled itself** from TriMark and was still unaffiliated and "small"
  - **OHA rejected arguments** regarding "identity of interest" based on "economic dependence" and "common management"
  - **OHA:** "The *mere fact that GSL and TriMark <u>historically were affiliated</u>*, or that certain individuals may have worked for both companies, is not sufficient to show control, affiliation, or identity of interest as of [2022]."

Size Appeal of: Aldevra, LLC, SBA No. SIZ-6240

Affiliation and De-Affiliation

- **M&A and Set-Aside Task Order Proposals under Navy Seaport-NxG (an Unr*estricted* MAC)**
  - 7/14/2021: Appellant awarded a Seaport-NxG MAC
  - 10/25/22: Navy issues 100% SB set aside RFQ under Seaport-NxG MAC
  - 11/9/22: Appellant acquired by a private equity firm
  - 11/29/22: Appellant submitted offer under the RFQ
  - Area Office: Under 121.404(g)(2)(i), post-M&A size recertification meant Appellant's size was determined at time of task order proposal rather than at time of award of the MAC. Appellant is "large" following its 11/9 acquisition.
  - *Curiously, Area Office did not rely on 121.404(a)(1)(i)(A) regarding set-aside task orders under unrestricted MACs like Seaport-NxG*

Size Appeal of: Forward Slope, Inc., SBA No. SIZ-6258

Affiliation and De-Affiliation

- **M&A and Set-Aside Task Order Proposals under Navy Seaport-NxG (an Unr*estricted* MAC)**
  - **OHA reverses the determination that Appellant is "large"**
  - OHA's reasoning: "**if the Multiple Award Contract was set-aside for small businesses**, . . . then in the case of a contract novation, or merger or acquisition where no novation is required, where the resulting contractor is now other than small, the agency cannot count any new orders issued pursuant to the contract, from that point forward, towards its small business goals."
  - OHA: "[T]he consequence of a merger or acquisition involving a prime contractor is **not that the prime contractor becomes ineligible for award of pending or future task orders**, but rather that the procuring agency cannot claim goaling credit for those orders."
  - **OHA Error? But Navy Seaport-NxG is an unrestricted MAC**. Size for task orders is determined at **the time of task order proposal**.

Size Appeal of: Forward Slope, Inc., SBA No. SIZ-6258

2023 Highlights from SBA's Office of Hearings and Appeals

More Joint Venture Bloopers

More Joint Venture Bloopers

- **Importance of Timely Addenda of JV Agreement**
  - Awardee was an ASMPP JV
  - 125.8(b)(2)(vi): JV agreement required to itemize all major equipment, facilities, and other resources
  - 125.8(b)(2)(ii): JV agreement must name an employee of the protégé who will be the "responsible manager"
  - Awardee's JV Agreement lacked these provisions
  - In response to Size Protest, Awardee provided an unsigned addendum to the JV Agreement
  - Area Office relied on the addendum and determined that Awardee was compliant with 125.8 and "small"
  - **OHA reversed….**

Size Appeal of: Focus Revision Partners, SBA No. SIZ-6188

More Joint Venture Bloopers

- **Importance of Timely Addenda of JV Agreement**
  - **OHA reversed:**
  - **The addendum was <u>unsigned</u>** by the members and did not comply with Joint Venture Agreement regarding "amendments"
  - Even if signed, the **addendum could not be considered** because it was **created <u>after the date</u> of final proposal revisions**
  - "As the JVA Addendum did not exist as of September 10, 2021 [due date for FPRs], the JVA Addendum should have been disregarded. OHA has repeatedly held that documents created, or events transpiring, after the date to determine size are not relevant for purposes of assessing questions of size and affiliation."

Size Appeal of: Focus Revision Partners, SBA No. SIZ-6188

More Joint Venture Bloopers

- **Another Noncompliant JV Agreement**
  - **OHA:** Awardee's JV Agreement **failed to specify the responsibilities of the parties** with respect to negotiation of the contract, source of labor, and contract performance
  - OHA: JV Agreement provided non-veteran partner with **"negative control"** over some day-to-day management:
    - Regarding new hires, job boards, terminations, badges, offer letters and other HR like responsibilities, the Operating Agreement states "**[e]ach party shall be responsible for this task within their scope of work**." Id. Thus, the non-veteran partner may exercise negative control by controlling the hiring and firing of employees, and other HR actions.

Size Appeal of: Silotech-Apex JV, LLC, SBA No. VSBC-297

More Joint Venture Bloopers

- **Mind the "Two-Year" Bidding Period and Form a Second Joint Venture**
  - 2018: FPMS JV receives first and only contract award
  - Nov. 2020: SBA amends JV rules and says they have no retroactive effect
  - 2022: The same FPMS JV bids on follow on contract for the same program
  - OHA: Because FPMS was subject to a two-year bidding period under the old "3-in-2" rule in 2018, FPMS triggered affiliation between its partners when it bid on the follow on contract in 2022
  - OHA rejected arguments that the Nov. 2020 amendment to the JV rules did not apply retroactively to the 2018 contract award.

Size Appeal of: Federal Performance Management Solutions, LLC,
SBA No. SBA-6246

2023 Highlights from SBA's Office of Hearings and Appeals

One Company's Strategic Use of NAICS Code Appeals

Strategic Use of NAICS Code Appeals

- ***NAICS Appeal of: Laredo Tech. Servs, Inc.*, NAICS-6173 (Sept. 23, 2022)** (in VA procurement, OHA changes NAICS Code from 561311 (Employment Placement Agencies) with size standard of $30 million to 561110 (Office Administrative Services) with a size standard of $11 million)
- ***NAICS Appeal of: Laredo Tech. Servs, Inc.*, NAICS-6186 (Jan. 25, 2023)** (in VA procurement, OHA changes NAICS Code from 561320 (Temporary Help Services) with size standard of $34 million to 621320 (Office of Optometrists) with a size standard of $9 million)

Strategic Use of NAICS Code Appeals

- ***NAICS Appeal of: Laredo Tech. Servs, Inc.*, NAICS-6216 (May 30, 2023)** (in VA procurement, OHA changes NAICS Code from 561320 (Temporary Help Services) with size standard of $34 million to 621512 (Diagnostic Imaging Centers) with a size standard of $19 million)
- **June-July 2023:** VA Contracting Officers agreement to voluntarily change NAICS codes to smaller size standards in response **three more appeals of Laredo**
- **NAICS Appeal of: Laredo Tech. Servs, Inc., NAICS-6238 (Aug. 17, 2023)** (in VA procurement, *OHA (finally)* ***denies*** Laredo's appeal to change NAICS code from 561320 to 621399)

2023 Highlights from SBA's Office of Hearings and Appeals

Small Business "Manufacturers" and Facilities

Small Business "Manufacturers" and Facilities

- ***Size Appeals of: Master Boat Builders, Inc., et al.*, SBA No. SIZ-6198**
- **Coast Guard** procurement for river buoy tender variant cutters and inland construction tender variant cutters. Size standard is **1,250** employees.
- **Area Office** found that the **Awardee (Birdon) <u>was</u> the "manufacturer"** of its proposed cutters. (Nonmanufacturer Rule with its 500-employee standard did not apply.)
- Birdon did not own or lease its manufacturing facility
- Birdon had a "teaming agreement" with Bollinger, which was an "agreement to agree" on a future lease.

Small Business "Manufacturers" and Facilities

- **OHA reversed.** Birdon was not the "manufacturer" because it **lacked a binding agreement to own or lease** its proposed manufacturing facilities.

- **"Manufacturer"** must be "the concern which, **with its own facilities**, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired." 13 CFR 121.406(b)(2).

- The phrase **"its own facilities"** means the concern "need only **occupy and control** the facilities, if not as an owner, then as a lessor or tenant."

Small Business “Manufacturers” and Facilities

- **OHA:** “A **fully executed lease** of the proposed premises for manufacturing ***need <u>not</u>*** be in place at the time of the proposal.”
- “However, there must be **some agreement in writing** between the challenged concern and its prospective landlord in place ***at the time of the proposal*** for the challenged concern to occupy and control the facilities it will use to manufacture the end item-if not as an owner, then as a tenant.”
- The teaming agreement was insufficient to meet the “own facilities” factor, and the nonmanufacturer rule applied.

2023 Highlights from SBA's Office of Hearings and Appeals

Adverse Inference Rule and Unreasonable Area Office Demands

Unreasonable Area Office Demands

- ***Size Appeals of: VMJR Companies LLC*, SBA No. SIZ-6199**
- Army procurement for building construction services. NAICS 236220 with size standard of $39.5 million.
- Awardee's size was protested.
- Area Office erroneously requested only three years of tax returns.
- Area Office realized it needed five years of income information and revised its request.
- Awardee had *11 acknowledged affiliates*

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- 9/20/22 at 5:23 PM: Area Office demands missing tax returns by Sept. 22. **Awardee was warned about "adverse inference" rule**.
- 9/21/22: Awardee expresses challenges in gathering information.
- 9/22/22: Area Office gives awardee until Noon on 9/23/22 to provide missing information.
- 9/23/22: Awardee missed the deadline.
- 9/26/22: Area Office issues size determination based on adverse inference from missing tax returns.

Unreasonable Area Office Demands

- **OHA *reverses.***
- “Fundamentally, an area office is required to observe the basic principles of **due process** in its requests for information.”
- “The subsequent actions taken by the Area Office in its quest for information **deprived Appellant of basic due process**.”
- The Area Office's final extension notice made on September 22, 2022, after business hours with a 4-hour deadline of the next day, **was clearly unattainable to the point of being inequitable**. The Area Office thus set a deadline which **did not take into account the “amount and type of information requested**”, and the source from which it had to be obtained. Overall, I **cannot find that the Area Office acted reasonably** when making additional requests . . . and overlooking the fact that Appellant had requested the tax returns for multiple entities and was **waiting from its accountant.”**

Unreasonable Area Office Demands

- **OHA *reverses.***
- “The Area Office was acting with a **sense of urgency** because “the **contracting officer was anxiously waiting** for this size determination” and due to its desire to comply with the 15-business day deadline for SB A to render a size determination.”
- “However, this **sense of urgency <u>cannot justify</u> the Area Office's failure to provide Appellant with adequate opportunity** to submit the requested information.”

Upcoming Events

Date	Event	Location
January 30 **10:00 AM**	2023 Small Business Regulatory Year in Review	Virtual
February 5 **12:00 PM**	What Contractors Need to Know about the CMMC Proposed Rule	Webinar
February 12 **10:00 AM**	IT/Services Committee Meeting with GSA ITC	GDIT Falls Church, VA
February 21 **12:00 PM**	Healthcare Focus: Briefing on the NDAA for Fiscal Year 2024	Webinar
February 22 **12:00 PM**	The Latest Alliant 3 Draft RFP: A Review	Webinar
February 28 **9:30 AM**	GSA & VA Schedule Contracting Training for In-House Counsel	Miller & Chevalier Chartered Washington, DC
May 8-9	Spring Training Conference	Fairview Marriott, Falls Church, VA

Thank you