

Big Changes for Small Businesses: 2019 Government Contracts Legal Update

2019 Bridging Partnerships

Kennewick, Washington

May 16, 2019

A faint, light blue line-art illustration of a government building with a central dome and classical architectural details like columns and pediments serves as the background for the slide.

Presentation Overview

- Runway Extension Act
- Proposed HUBZone Program Overhaul
- SDVOSB/VOSB Programs Overhaul
- Section 809 Panel
- Questions

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Small Business Runway Extension Act

Small Business Runway Extension Act

- A business's size under revenue-based NAICS codes is its average annual receipts over a period of time
- This Act amends the Small Business Act to change the period for measuring a business's size from three years to five
 - “by striking ‘3 years’ and inserting ‘5 years’”

Small Business Runway Extension Act

- Small Business Act is statutory (15 U.S.C. § 632)
 - Changed immediately
- SBA framework is regulatory (13 C.F.R. § 121.104)
 - Change must be adopted
 - Public comment period, etc.

Small Business Runway Extension Act

- Purpose: To help businesses ease their transition from small to large
- House Committee on Small Business report:
 - “help advanced-small contractors successfully navigate the middle market as they reach the upper limits of their small size standard.”
 - Translation: Stay small longer

Small Business Runway Extension Act

- SBA opposed this change

“[T]hree years should reasonably balance the problems of fluctuating receipts with the overall capabilities of firms that are about to exceed the size standard. Extending the averaging period to five years would allow a business to greatly exceed the size standard for some years and still be eligible for Federal assistance, perhaps at the expense of other smaller businesses.”

From the federal register (April 27, 2018)

Small Business Runway Extension Act

- No effective date
- SBA position: Change not effective until regulation is updated
 - “not presently effective and therefore not applicable to present contracts, offers, or bids until implemented through the standard rulemaking process.”
 - SBA is probably wrong
 - Statutes are presumed effective immediately unless stated otherwise
 - Statutes “outrank” regulations

Small Business Runway Extension Act

- **Update:** SBA now says that the Runway Extension Act applies to all agencies BUT the SBA
 - Huh?
- SBA still seems wrong: Provision applies to any agency, no exclusions
- Congress said the purpose of the Act is to “lengthen the time in which *the Small Business Administration (SBA)* measures size through revenue . . .”

Small Business Runway Extension Act

- **Another Update:** The House Committee on Small Business proposed clarifying legislation.
- **Key Points:**
 - The SBA Administrator has until December 17, 2019, to implement the Runway Extension Act
 - Requires transition plan to be in place 90 days after the clarifying legislation was passed
 - Amendment by Mr. Hagedorn (R-MN) states that the bill has been effective since it was signed into law

Small Business Runway Extension Act

- If you're the subject of a size protest what do you do?
 - Best: be small under both calculations
 - If one or the other, certainly arguable that either standard might apply.
- Say you'd be small under the 5-year standard and there's a small business set aside you want to go after, can you self-certify as small?
 - _(ツ)_/
 - At some point, either the courts will sort it out, or the SBA will update the regulation.

A faint, light blue line-art illustration of a government building, likely a state capitol, is visible in the background. It features a large central dome with a finial, flanked by two smaller domes, and a facade with numerous windows and columns.

HUBZone Program Proposal

HUBZone Program Proposal

- Proposed rule issued October 31, 2018
- Rule would overhaul many aspects of HUBZone Program
- Rule also clarifies some important nuances about how SBA is currently administering HUBZone Program

HUBZone Program Proposal

- Government's HUBZone achievement has been around 2%, versus 3% annual goal
- In proposed rule, SBA recognizes some structure deficiencies in the current program rules, including:
 - Changes in HUBZone tracts
 - Relocation of employees
 - Remain in active compliance as of bid/award date of any HUBZone contract

HUBZone Program Proposal

- “Attempt to maintain” standard
 - Current Rule: certified HUBZones must attempt to maintain compliance with 35% requirement but doesn’t provide metrics
 - Proposed Rule: Falling below 20% HUBZone employees during performance of a HUBZone contract will be deemed failure to attempt to maintain

HUBZone Program Proposal

- **Definition of “Employee”:**
 - Current rule: An “employee” generally must work at least 40 hours per month
 - Proposed Rule: An “employee” must have worked at least 40 hours during the four-week period immediately prior to the relevant date (date of application or recertification)
 - SBA seeks comment on whether metric should be 20 hours per week instead of 40 hours per month
 - SBA clarifies that bona fide 1099s are not considered employees and that employees of subcontractors don’t count
 - SBA clarifies “clear line of fracture” test with respect to employees of affiliates
 - SBA seeks comment on whether an “employee” can work for multiple HUBZone companies

HUBZone Program Proposal

- Definition of “Principal Office”
 - SBA clarifies that consideration of principal office includes both HUBZone and non-HUBZone employees
 - SBA clarifies that business must be done at location for it to be a principal office
 - SBA clarifies that if an employee spends more than 50% of his/her time at a location, he/she is deemed to work there for principal office purposes

HUBZone Program Proposal

- Definition of “Reside”
 - SBA eliminates requirement that individual have intent to live there indefinitely
 - SBA proposes that “reside” means to live at a location full-time for at least 180 days
 - SBA proposes to consider employee’s U.S. residence if employee is temporarily located overseas
 - An employee who lived in a HUBZone, as a HUBZone resident, for a certified HUBZone firm, would continue to be treated as a HUBZone employee even if he/she moves out of the HUBZone, so long as he/she works for same company

HUBZone Program Proposal

- 35% HUBZone residency requirement:
 - SBA clarifies that all employees, including jobsite employees, are included in the 35% calculation
 - SBA proposes to allow rounding to nearest whole number, rather than always rounding up
 - If firm has six employees, 35% is 2.1
 - Under current rule, firm would be required to round up, and show 3 HUBZone employees
 - Under proposed rule, firm could round down and show 2 HUBZone employees

HUBZone Program Proposal

- Application:
 - SBA proposes adding a formal process to allow a request for reconsideration of HUBZone denial
 - Request would be due 15 calendar days after receiving denial letter
 - Compare with 45 days in the 8(a) Program
 - Could submit new information that wasn't previously submitted
 - Still no process to appeal denial to SBA OHA

HUBZone Program Proposal

- Maintaining HUBZone status:
 - SBA proposes annual recertification of status instead of recertification every three years
 - SBA will continue to perform audits of HUBZone firms
 - Failing to recertify will result in termination proceedings

HUBZone Program Proposal

- **HUBZone Contracts:**
 - SBA proposes that a firm would no longer have to be in active compliance on bid and award dates
 - Instead, a firm is eligible for HUBZone contracts if:
 - It certified or recertified within one year
 - Is a small business under the relevant NAICS code

HUBZone Program Proposal

- HUBZone Protests:
 - SBA clarifies that HUBZone status protests may be filed against joint ventures
 - SBA proposes requiring protested company to respond in only three business days

A faint, light blue line-art illustration of a government building with a prominent dome and classical architectural details like columns and pediments, serving as a background for the slide.

SDVOSB/VOSB Programs Update

SDVOSB/VOSB Programs

- The Government operates two SDVOSB programs—SBA and VA
 - Until October 1, 2018, these two programs had different eligibility requirements
 - *Veterans Contracting Group, Inc. v. United States*, No. 17-1188C (2017): Company was eligible SDVOSB under VA rules but not SBA
 - Although eligibility requirements are now standardized, important differences remain

SDVOSB Consolidation

SBA SDVOSB Program

- Applies to contracts by almost all non-VA agencies
- No priority over other socioeconomic classes
- Verification not required (self-certify in SAM instead)
- Eligibility determined on date of bid

VA SDVOSB Program

- Applies to VA contracts
- Priority over other socioeconomic classes (*Kingdomware*)
- Verification required
- Eligibility determined on date of bid and date of award

SDVOSB Consolidation

- **Before October 1, 2018:**
 - SBA and VA SDVOSB Programs had many substantive differences, including:
 - Full-time devotion (VA only)
 - Highest-paid (VA only)
 - No restrictions on ownership transfers (SBA only)
- **Consolidated rule eliminates most substantive differences**
 - A company eligible for VA verification is likely also eligible to self-certify as an SDVOSB for non-VA work, and vice versa
 - But VA retains a few unique requirements – unclear whether permitted by Congressional intent

SDVOSB Consolidation

- **Big Picture Eligibility Requirements (13 C.F.R. 125.11):**
 - Small business in primary NAICS code
 - At least 51% unconditionally and directly owned by SDVs/Veterans (or, in certain cases, surviving spouses or permanent caregivers)*
 - Management and daily business operations controlled by Veterans

** For ease of reference, I use “Veterans” to refer collectively to eligible individuals*

SDVOSB Consolidation

- Ownership Requirements (13 C.F.R. 125.11 & 13 C.F.R. 125.12):
 - Veterans must be entitled to:
 - At least 51% of annual distribution of profits
 - Profits commensurate with ownership interest
 - 100% of the value of ownership interest if sold
 - At least 51% of retained earnings and 100% of unencumbered values of ownership in event of dissolution

SDVOSB Consolidation

- Control Requirements (13 C.F.R. 125.11 & 13 C.F.R. 125.13):
 - Veterans must control long-term decision making
 - Veterans must control day-to-day management and administration of business operations
 - Includes, “but are not limited to, the marketing, production, sales, and administrative functions of the firm, as well as the supervision of the executive team, and the implementation of policies.”

SDVOSB Consolidation

- Control Requirements (13 C.F.R. 125.11 & 13 C.F.R. 125.13):
 - Veterans must hold highest officer position in the company (usually President or CEO)
 - Veteran holding the position must have “managerial experience of the extent and complexity needed to run” the company
 - License/technical expertise may not be required if veteran can demonstrate “ultimate managerial and supervisory control”
 - Be careful here: potential conflict with rebuttable presumption elsewhere in regulation

SDVOSB Consolidation

- Control Requirements (13 C.F.R. 125.11 & 13 C.F.R. 125.13):
 - Veterans must be able to overcome all supermajority and/or unanimity voting requirements
 - Exception for five (and only five) “extraordinary circumstances”:
 - Adding a new equity stakeholder
 - Dissolution of the company
 - Sale of the company
 - Merger of the company
 - Declaration of bankruptcy

SDVOSB Consolidation

- Rebuttable presumption of no control when:
 - Veteran “is not able to work for the firm during the normal working hours that firms in that industry normally work”
 - May include other employment, being a student, or any other obligation that prevents the Veteran from working these hours
 - Veteran “is not located within a reasonable commute to firm’s headquarters and/or job-site locations, regardless of the firm’s industry”

SDVOSB Consolidation

- Rebuttable presumption of no control when:
 - Non-Veteran involved in ownership or management is current or former employer of Veteran
 - Any non-Veteran receives compensation higher than the compensation of Veteran holding highest officer position

SDVOSB Consolidation

- Rebuttable presumption of no control when:
 - Non-Veteran with an equity interest in the company provides critical financial or bonding support
 - Providing a loan or loan guarantee on commercially reasonable terms does not, by itself, establish lack of unconditional control, but “when taken into consideration with other factors” may be used to find lack of control
 - Non-Veteran holds “critical license”
 - Defined as “any license that would normally be required of firms operating in the same field or industry, regardless of whether a specific license is required on a specific contract”

SDVOSB Consolidation

- Rebuttable presumption of no control when:
 - Company is co-located or shares employees, resources, etc. with another firm in the same or similar line of business, and that firm, a principal of that firm, or direct relative of that firm owns an equity stake in the company
 - “Business relationships exist with non-service-disabled individuals or entities which cause such dependence that the applicant or concern cannot exercise independent business judgment without great economic risk”

SDVOSB Consolidation

- VA-Specific Requirements (38 C.F.R. 74.2)
 - “Good Character”: Veteran or Company cannot be:
 - Debarred or suspended
 - Incarcerated or on parole or probation for a felony or any crime involving business integrity
 - Ineligible if “knowingly submitted false information” in verification application
 - Ineligible if Veteran or company failed to pay “significant financial obligations,” including federal and state taxes or defaulted loans

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Section 809 Panel

Section 809 Panel

- Panel comes from the 2016 NDAA, section 809
- Mission: “identifying ways to streamline and improve the defense acquisition system”
- Recent report (Vol. III): Some shocking recommendations
 - 1,120 pages

Section 809 Panel

- **Recommendation:**
 - Eliminate most small business set-asides for DoD acquisitions
 - Replace with 5% small business price preference
 - Argument is that set-asides incentivize businesses to stay small

Section 809 Panel

- Would be a seismic shift in the contracting landscape
- **Small Business Act:** “It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns”
- Rule of Two: policy to set aside purchases (that are not micro-purchases) for small businesses

Section 809 Panel

- The panel believes the 5% price preference would ensure small businesses can compete with the multi-billion dollar corporations.
 - Price is rarely the sole deciding factor these days
 - HUBZone program has 10% preference
 - DoD FY 2017 goal: 3%
 - Reality: 1.56%

Section 809 Panel

- **Recommendation:** Eliminate the Court of Federal Claims jurisdiction to hear bid protests after GAO
- Protesters would have to choose one forum or another

Section 809 Panel

- Currently three forums: Agency, GAO, COFC
 - A protest to the agency can then be filed at GAO
 - A protest to GAO can then be filed at COFC
 - Leading some to treat COFC as though it is an appeal court for GAO
- Not vice versa
- So, can fight your way up, but not down

Section 809 Panel

- Panel says change would solve problem of undermining GAO mandate: “providing for the inexpensive and expeditious resolution of protests”
- Panel believes the vast majority of protesters would still use GAO
 - Cost
 - Speed

Section 809 Panel

- GAO makes recommendations
 - No injunctive relief
 - Usually followed
 - Resolved in 100 days
- COFC
 - Orders actions
 - Recourse: Ask the court to order the agency to take the recommended action
 - Resolved on average 133 days

Section 809 Panel

- Recommendation: Change “Once 8(a), Always 8(a)” rule to allow removal without SBA’s explicit consent
- Current rule, once work is accepted by the SBA for inclusion in the 8(a) program, any follow-on contract must also be 8(a)

Section 809 Panel

- Removal now requires the contracting officer to send a formal request to the SBA
- 809 panel: “no prescribed timeframe” for SBA response
- Unnecessary delays

Section 809 Panel

- Hard deadline for response: 15 working days
- Miss deadline? Release is presumed, proceed with award

Section 809 Panel

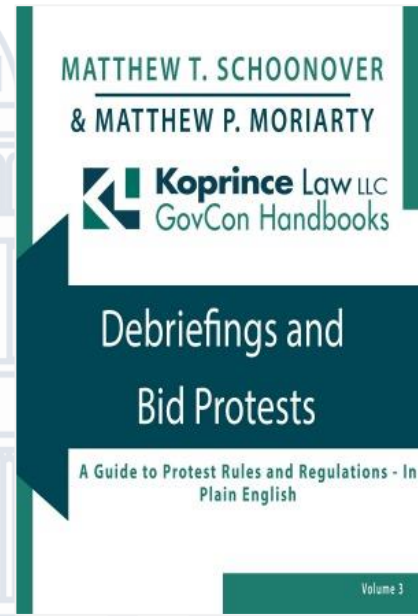
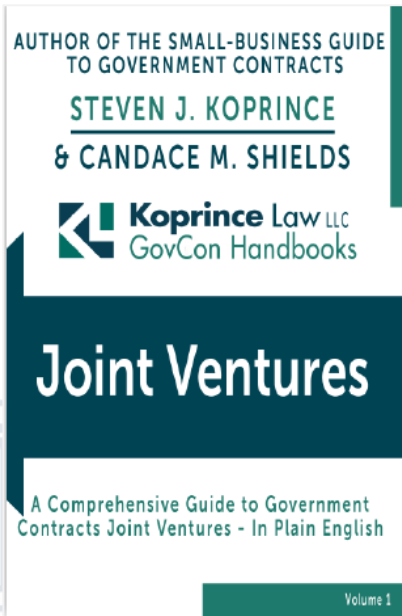
- **Concerns**
 - How widespread are these delays?
 - Report noted one delay was 90 days, but same respondent said a different time SBA responded in 3 days
 - No statistical average for how long response takes
 - Why 15 days? SBA needs time to determine “whether the requirement is critical to the business development of the 8(a) Participant that is currently performing it.”
 - How does SBA feel about change?

Questions?

Any questions?

Thank you!

The Handbooks





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