CHAPTER 11

SET-ASIDES AND PREFERENCE PROGRAMS

Because small businesses are responsible for most of the job creation and technical innovations in the United States, Congress and the president have shown great interest in encouraging the growth and health of small businesses throughout the American economy. One of the most direct ways the government can encourage and nurture small businesses is through federal contracts.

THE SMALL BUSINESS ACT

The **Small Business Act of 1953** states that small businesses should receive a "fair proportion" of federal contracts and that small businesses should have the "maximum practical opportunity" to participate in federal contracting. The Small Business Act established the **Small Business Administration** (SBA) to aid small businesses and to insure they receive a "fair proportion" of federal contracts.

Congress has established a **23%** governmentwide goal for awards of contracts to small businesses. Subsets of the small business goal are a **5%** governmentwide goal for awards to small disadvantaged businesses (SDBs), a **5%** governmentwide goal for awards to women-owned small businesses (WOSB), a **3%** governmentwide goal for awards to "historically underutilized business zone" (HUBZone) small businesses, and a **3%** governmentwide goal for awards to service-disabled veteran-owned small businesses (SDVOSB). A contract can get counted towards more than one goal: an award to an SDB in a HUBZone that is owned by a service-disabled woman veteran would be counted towards *all* the goals.

Each year the SBA negotiates "agency goals" with each department and agency. These agency goals may be higher or lower than the governmentwide goals, depending on the types of supplies and services the particular agency acquires.

The SBA maintains statistics that show how successful each department and agency is in attaining its goals. It provides these statistics to Congress and the president, and disappointing statistics sometimes trigger new legislation and mandates. This is why the departments and agencies pay close attention to the number of contracts awarded to each targeted group of businesses. This is also the reason each contracting activity has at least one Small and Disadvantaged Business Utilization Specialist (SADBUS) to help these businesses (see Chapter 2 for more on the SADBUS and his functions).

To comply with these "socioeconomic policies," the government uses **set-asides** and **preference programs** to encourage small businesses, SDBs, HUBZone concerns, and SDVOSBs to obtain and perform government contracts.

SMALL BUSINESS SET-ASIDES

The **small business set-aside** is the most common socioeconomic program. It restricts, or "sets aside," contracts exclusively for small business participation. Only businesses that do not exceed prescribed size standards for the supply or service being acquired are considered small and are allowed to bid or propose on small business set-asides. Bidders or offerors that exceed the applicable size standard for a particular small business set-aside are, by definition, nonresponsive and their bids or proposals will be rejected.

The "Rule of Two"

Paragraph (a) of FAR 19.502-2, Total Small Business Set-Asides, states that purchases "*shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery*." This requirement is commonly called the "rule of two," and it applies to all purchases that exceed the micro-purchase threshold (see Chapter 8). Because of the importance each agency places on meeting its small business contract award goals, most agencies require each contracting activity's SADBUS to review all acquisitions over the simplified acquisition threshold that its contracting officers decide *not* to set aside. SADBUSs commonly use the **Central Contractor Registration** (CCR) database to convince contracting officers of the existence of capable small businesses (see Chapter 5 for more on the CCR).

Size Standards

The SBA establishes small business size standards on an industry-by-industry basis. It uses the ***North American Industry Classification System*** (NAICS) codes to

identify the various industries (NAICS codes are available at **http://www.census.gov/epcd/www/naics.html**). The most prevalent size standard for manufacturing industries is **500 employees**, and the most prevalent size standard for service industries is **$7.0 million in average annual gross revenue over the last three fiscal years**. For most industries, a company that does not exceed these size standards is considered "small." While a business with 500 employees or $7.0 million in gross revenue may not seem small, the purpose of setting the size standard at these levels is to allow small businesses to grow into thriving "medium" businesses before losing the benefits of their small business size status.

However, the usual 500 employees/$7.0 million size standards do not apply to all industries. A company that manufactures breakfast cereal foods is considered small if it has fewer than 1,000 employees (NAICS code 311230), while a company that manufactures cookies and crackers is considered small if it has fewer than 750 employees (NAICS code 311821). A drycleaning plant is considered small if its average annual gross revenue for the preceding three years does not exceed $4.5 million (NAICS code 812320), but an establishment that drycleans industrial work uniforms is considered small if its average annual receipts for the preceding three years does not exceed $14.0 million (NAICS code 812332). The SBA sets these size standards after determining the average size of the firms in each industry and the amount of competition within each industry.

The small business size standards are available at **http://www.sba.gov/size**. The contracting officer selects the appropriate NAICS code and size standard for the supply or service he intends to purchase, and he includes this information in **FAR 52.204-8, Annual Representations and Certifications** (in Section K of the Uniform Contract Format – see Chapter 7).

The contracting officer's selection can determine whether a company is allowed to participate in a small business set-aside. For instance, if a contracting officer decides to set aside a contract for paperboard boxes, should he categorize the boxes as "Setup Paperboard Boxes" (NAICS code 322213), which has a size standard of 500 employees, or as "Folding Paperboard Boxes" (NAICS code 322212), which has a size standard of 750 employees? The contracting officer's decision will determine whether companies with between 500 and 750 employees will be able to participate in the set-aside. This is why the SBA allows bidders and offerors to appeal the contracting officer's decision (see paragraph (c) of FAR 19.303, Determining North American Industry Classification System (NAICS) Codes and Size Standards, and Chapter 17 for more on size standard appeals).

If a small business submits a bid or proposal for supplies under a small business set-aside expected to exceed $25,000, but that small business is not the manufacturer of those supplies, the size standard is **500 employees** regardless of the actual size standard for the supply (this is called the "**nonmanufacturer rule**"). In addition, the small business nonmanufacturer must furnish supplies produced by a small business manufacturer or producer ("a concern that, with its own forces, transforms organic or

inorganic substances including raw materials and/or miscellaneous parts or components into the end product"), and the supplies must be manufactured or produced in the United States. However, if the SBA has determined that there are *no* small business manufacturers or processors in the industry, the small business nonmanufacturer may provide supplies produced by *any* domestic manufacturer or processor. The nonmanufacturer rule is addressed in paragraph (f) of FAR 19.102, Size Standards. A complete list of supplies for which the nonmanufacturer rule has been waived is available at **http://www.sba.gov/GC/approved.html**.

For more on small business size standards, see FAR Subpart 19.1.

Size Status Determination

Each bidder or offeror provides information about its average annual gross revenue and employees in the **Online Representations and Certifications Application** (ORCA) (see Chapter 7). This information, along with information obtained from the CCR, is used by SBA's computers to determine whether the bidder or offeror is a small business for the NAICS code the contracting officer identified in FAR 52.204-8 as applying to the acquisition. However, those who question the accuracy of the information the bidder or offeror entered into ORCA may file a **protest** with the contracting officer. With set-aside invitations for bids (IFBs), protestors have **five working days** after bid opening to file their protests. With set-aside requests for proposals (RFPs), the contracting officer must notify each unsuccessful offeror of the name and address of the apparent successful offeror, and protestors have **five working days** from receipt of this notice to file their protests. The protest must provide detailed evidence supporting the allegation that the bidder or offeror is not small. The contracting officer promptly forwards the size status protest to the SBA for decision (see Chapter 17 for more on protests regarding small business status).

Small Business Joint Ventures and Team Arrangements

A joint venture ("an association of persons and/or concerns . . . consorting to engage in and carry out a single specific business venture for joint profit . . . ") or team arrangement of two or more small businesses may submit an offer as a small business as long as each concern is small under the applicable size standard *if*: (1) for an acquisition with a revenue-based size standard (such as $7.0 million), the procurement exceeds half the corresponding size standard (if the applicable size standard is $7.0 million, the acquisition would have to be larger than $3.5 million); or (2) for an acquisition with an employee-based size standard (such as 500 employees), the acquisition exceeds $10 million.

Limitations on Subcontracting

Besides the small business representation, each contract awarded as a small business set-aside includes FAR 52.219-14, Limitations on Subcontracting, in which the bidder or offeror agrees, as a condition to contracting, that for:

- **Services** (except construction), at least **50%** of the cost of performance will be expended for employees of the concern.
- **Supplies**, at least **50%** of the cost of manufacturing the supplies, excluding the cost of materials, will be performed by the concern (this does *not* apply to **dealers** or other nonmanufacturers).
- **General construction**, at least **15%** of the cost of the contract, excluding the cost of materials, will be performed by its own employees.
- **Construction by special trade contractors**, at least **25%** of the cost of the contract, excluding the cost of materials, will be performed by its own employees.

The limitations on subcontracting do not apply to small business nonmanufacturers (see above)

Dissolving Small Business Set-Asides

If, after evaluating the bids or proposals submitted in response to a small business set-aside solicitation, the contracting officer determines that none of the bids or proposals are reasonable or none of the bidders or offerors are responsible (including the refusal by the SBA to issue a certificate of competency (COC) for any of the bidders or offerors – see Chapter 7), he dissolves the set-aside and resolicits without any size restrictions: large and small businesses may submit bids or proposals. However, as a rule, the prices must be exceedingly unreasonable before a contracting officer will dissolve a set-aside. This is because most contracting officers do not want to resolicit and, consequently, incur additional delay and administrative expenses.

See FAR Subpart 19.5, Set-Asides for Small Business, for further information on small business set-aside procedures.

SMALL DISADVANTAGED BUSINESS (SDB) PREFERENCE PROGRAMS

Firms that are "**small disadvantaged businesses**" (SDB) may benefit from **two programs** described in FAR Subpart 19.12, Small Disadvantaged Business Participation Program: (1) an evaluation factor for the participation of SDBs in performance of the contract; and (2) an SDB incentive subcontracting program.

SDB Qualifications

To obtain a benefit from either of these SDB programs, a firm must have a good faith belief that it meets the following qualifications:

- It does not exceed the applicable small business size standard corresponding to the NAICS code that corresponds to its primary business activity (see above).
- At least 51% of the firm is owned and controlled by a "socially" *and* "economically" disadvantaged individual or individuals.
  - To qualify as **socially disadvantaged**, an individual must be an American citizen and either (1) be a member of a group that is presumed to be socially disadvantaged (that is, be a Black American, Hispanic American, Native American, Asian Pacific American, or Subcontinent Asian American), or (2) show by a "preponderance of evidence" that he is socially disadvantaged because of "race, ethnicity, gender, physical handicap, or residence in an environment isolated from the mainstream of American society."
  - To qualify as **economically disadvantaged**, an individual must have net worth less than $750,000 (excluding ownership in the firm and his principle residence).

Firms participating in the SBA's 8(a) program (see below) are automatically considered SDBs. Firms not in the 8(a) program may self-represent their SDB status. However, the SBA may initiate a review of a firm's SDB status whenever it receives credible evidence questioning the firm's status. If the SBA determines that a firm knowingly misrepresented its SDB status on a subcontract to a federal contract, the firm is subject to ***severe*** penalties (see end of the chapter).

Department of Commerce Designated Industry Groups

The Department of Commerce (DOC) is required by statute to determine which Major Industry Groups have "persistent and significant underutilization of minority firms," and to identify appropriate "procurement mechanisms" to improve this underutilization. DOC has determined that SDBs performing in the following industries are eligible for the benefits of the two SDB programs (see **http://www.acquisition.gov/References/sdbadjustments.htm**):

Metal mining
Coal mining
Oil & gas extraction
Extraction of nonmetallic minerals, except fuels
Building construction – general contractors (East North Central, East South Central, Middle Atlantic, and West South Central regions only)

Heavy construction other than buildings – contractors (East South Central and West South Central regions only)
Construction – special trade contractors (New England and West North Central regions only)
Textile mill products
Apparel & other finished products made from fabrics
Lumber & wood products, except furniture
Furniture & fixtures
Paper & allied products
Printing, publishing, & allied industries
Chemicals & allied products
Petroleum refining & related industries
Rubber & miscellaneous plastics products
Leather & leather products
Fabricated metal products
Electronic & other electrical equipment & components, except computers
Transportation equipment
Measuring, analyzing, & controlling instruments; photographic, medical & optical goods; watches & clocks
Miscellaneous manufacturing industries
Local & suburban transit & interurban highway passenger transportation
Motor freight transportation & warehousing
Water transportation
Pipelines, except natural gas
Transportation services
Communications
Electric, gas, and sanitary services
Wholesale trade – durable goods
Wholesale trade – nondurable goods
Building materials, hardware, garden supply & mobile home dealers
General merchandise stores
Food stores
Automotive dealers & gasoline service stations
Apparel & accessory stores
Home furniture, furnishings, & equipment stores
Eating & drinking places
Miscellaneous retail
Depository institutions
Nondepository credit institutions
Security & commodity brokers, dealers, exchanges, & services
Insurance carriers
Insurance agents, brokers, & services
Real estate

Holding & other investment offices
Hotels, rooming houses, camps, & other lodging places
Business services
Automotive repair, services, & parking
Miscellaneous repair services
Health services
Educational services
Engineering, accounting, research, management, & related services
Miscellaneous services

SDB Subcontracting Evaluation Factor

In all competitive, negotiated acquisitions that are expected to exceed **$550,000** ($1,000,000 for construction), contracting officers are required to evaluate the extent each offeror proposes to subcontract with SDBs in the DOC-designated industry groups. This requirement does *not* apply to small business set-asides (see above), HUBZone set-asides (see below), service-disabled veteran-owned small business set asides (see below), acquisitions through the SBA's 8(a) program (see below), negotiated acquisitions in which the government intends to award a contract to the offeror submitting a technically acceptable proposal with the lowest evaluated price, or contracts that will be performed outside of the United States and its territories.

The actual evaluation factor is left to the contracting agencies to develop. The agencies may consider:

- The extent to which SDBs are specifically identified in the proposal;
- The extent of commitment to use SDBs (enforceable commitments are to be weighted more heavily than non-enforceable ones);
- The complexity and variety of the work SDBs are to perform;
- The realism of the proposal;
- Compliance with SDB subcontracting plan goals and monetary targets in past contracts; and
- The extent of participation of SDBs in relation to the overall value of the contract.

As part of their offers, offerors must provide targets (expressed as dollars and percentage of total contract value) for SDB participation in *each* of the covered industries as well as a total target for SDB participation. The offeror's proposed targets are incorporated into any resulting contract, and the contractor is required to file reports on SDB participation in the performance of the contract using an **Optional Form 312, Small Disadvantaged Business Participation Report**, in the contractor's own format if it provides the same information as the Optional Form 312, or using the **Electronic Subcontracting Reporting System**'s (eSRS) Small Disadvantaged Business Participation Report (**http://www.esrs.gov**). If the evaluation factor

states that part of the evaluation will consider the extent to which SDBs are specifically identified in the offer, the names of the identified SDBs are listed in the contract, and the contractor must notify the contracting officer if it substitutes a non-SDB for any of these SDBs.

Contractors may rely on their subcontractors' self-representations of SDB status.

Solicitations that consider the extent of SDB participation in the performance of the contract will include **FAR 52.219-24, Small Disadvantaged Business Participation Program – Targets**, and **FAR 52.219-25, Small Disadvantaged Business Participation Program – Disadvantaged Status and Reporting**.

For more on the SDB subcontracting evaluation factor, see FAR 19.1202, Evaluation Factor or Subfactor.

SDB Incentive Subcontracting Program

The contracting officer may authorize an additional payment **up to 10%** of the amount the contractor exceeds its monetary target for SDB subcontracts in the DOC-designated industry groups. These monetary incentives for SDB subcontracting may only be used in negotiated acquisitions.

When the contracting officer decides to include incentives for SDB subcontracting, the contract will include **FAR 52.219-26, Small Disadvantaged Business Participation Program – Incentive Subcontracting**, and FAR 52.219-25, which requires reporting of SDB participation on Optional Form 312, in the contractor's own format, or through the eSRS.

For more on the SDB subcontracting incentive program, see FAR 19.1203, Incentive Subcontracting with Small Disadvantaged Business Concerns.

SECTION 8(a) BUSINESS DEVELOPMENT PROGRAM

The purpose of the **Section 8(a) business development program**, which is named after Section 8(a) of the Small Business Act, is to foster business ownership by individuals who are both socially and economically disadvantaged, and to give these individuals the opportunity to participate fully in the free enterprise system. Participants in the 8(a) program are eligible to receive a broad range of assistance from SBA, including loans, training, counseling, marketing assistance, and high-level executive development. The most popular assistance for 8(a) participants are **sole source** and **set-aside contracts**.

The 8(a) program is a subset of the SDB program – all firms in the 8(a) program automatically qualify as SDBs, but not all SDBs are in the 8(a) program. To get into the 8(a) program, an SDB must apply to the SBA (an on-line application is available at **https://sba8a.symplicity.com/applicants/guide**). The qualifications for the 8(a) program are essentially the same as those for an SDB except: (1) to meet the eco-

nomic disadvantage test, all owners must have a net worth of less than **$250,000** excluding the value of the business and personal residence (however, once a firm is accepted into the 8(a) program, the limit on an individual's net worth increases to $750,000, same as for SDBs); and (2) the concern must have been in business for at least **two years** (this requirement may be waived if the socially and economically disadvantaged owner or owners demonstrate substantial technical and business management experience).

Ownership, social disadvantage, and economic disadvantage criteria are somewhat different for concerns owned by Indian tribes, Alaska Native corporations, and Native Hawaiian organizations. Furthermore, brokers and packagers, franchises, non-profit organizations, and debarred or suspended persons or concerns are not eligible to participate in the 8(a) program.

Currently, there are approximately **10,000 firms** participating in the 8(a) program, and approximately **$10 billion** are awarded under the 8(a) program each year.

Business Plan

After an SDB is accepted into the 8(a) program, but before it may obtain any 8(a) program benefits, it must prepare and submit for SBA approval a **business plan** outlining a reasonable approach for using the 8(a) contracts to develop the expertise and capabilities necessary to become self-sustaining and competitive. The goal of the 8(a) program is to "graduate" SDBs that can compete for government and commercial contracts on their own.

The business plan must explain how the 8(a) concern intends to use the 8(a) program to attain its business targets, objectives, and goals. The business plan must analyze the concern's strengths and weaknesses, assess its prospects for profitable operations during its program participation and after it leaves the program, and provide estimates of the contract awards it will need under the 8(a) program and from other sources to meet its specific targets, objectives, and goals. Once approved, the 8(a) concern must review its business plan with the SBA annually and modify the plan as appropriate.

Obtaining and Processing 8(a) Contracts

The SBA obtains procurements for the 8(a) program in three ways:

1. The contracting activity unilaterally offers the procurement to the SBA for the 8(a) program;
2. The SBA identifies a procurement as suitable for the 8(a) program and asks the agency for it; or
3. An 8(a) concern, through self-marketing, convinces a contracting activity to offer the procurement to the SBA on its behalf.

Most 8(a) contracts are awarded to 8(a) concerns on a sole source basis (either because the contracting activity is convinced the 8(a) concern can perform the contract at a fair market price or because the SBA has selected the particular 8(a) concern for the contract). Such sole source 8(a) contracts are *not* synopsized in **FedBizOpps**. However, any 8(a) acquisition over **$5,500,000** for manufacturing, or **$3,500,000** for services or construction, must be awarded through sealed bidding or competitive negotiations restricted to 8(a) concerns if there is a reasonable expectation that at least two eligible and responsible 8(a) concerns will submit offers and the award will be made at a fair market price (the "rule of two"). Competitive 8(a) solicitations *are* synopsized in **FedBizOpps**. If there is not a reasonable expectation that at least two 8(a) concerns will submit bids or offers at a fair market price, the SBA can authorize a sole source 8(a) award. However, this requirement to compete 8(a) acquisitions does *not* apply to concerns owned by an Indian tribe or an Alaskan Native corporation, nor does it apply to Department of Defense 8(a) contracts with concerns owned by Native Hawaiian organizations – 8(a) contracts of *any* size may be awarded to these types of concerns.

A joint venture or team arrangement in which at least one member is an 8(a) concern may submit an offer on a competitive 8(a) acquisition (that is, over $5,500,000 for manufacturing or over $3,500,000 for services or construction) as long as each concern is small under the applicable size standard *if* the size of at least one 8(a) member of the joint venture is *less* than half the corresponding size standard (that is, if the size standard is 500 employees, at least one 8(a) concern has fewer than 250 employees); and (1) if the acquisition has a revenue-based size standard (such as $10 million), the procurement *exceeds* half the corresponding size standard (that is, if the size standard is $10 million, the acquisition would have to be larger than $5 million); or (2) if the acquisition has an employee-based size standard (such as 500 employees), the acquisition exceeds $10 million.

For sole source and competitive 8(a) acquisitions that are less than these dollar levels, a joint venture or team arrangement must have at least one 8(a) concern as a member, and the combined annual receipts or employees of the concerns in the joint venture or team arrangement must meet the applicable size standard.

Duration of Program Eligibility

If accepted into the 8(a) program, the firm can stay in the program for **nine years**. The nine years of program eligibility are divided into two stages: the **developmental** stage and the **transitional** stage. During its **four years** in the developmental stage, the 8(a) concern is eligible for:

- Sole source and competitive 8(a) contracts;
- Financial assistance;
- Financial assistance for employee skills training or upgrading;

- Transfer of technology or surplus property; and
- Training sessions to help develop marketing skills and compete successfully for contracts in the marketplace.

During its **five years** in the transitional stage, the 8(a) concern is eligible for:

- All the assistance available to concerns in the developmental stage except financial assistance for employee skills training or upgrading;
- Assistance from contracting agencies in forming joint ventures, leader-follower arrangements, and team arrangements with other firms; and
- Training and technical assistance in transitional business planning.

To help 8(a) concerns transition from 8(a) subcontracts, firms in the transitional stage have "**non-8(a) business activity goals**," which represent revenue obtained outside the 8(a) program. The goals are:

Year in transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	35
4	45
5	55

Concerns that fail to meet these goals may cause the SBA to take remedial action, such as:

- Requiring the 8(a) concerns to obtain management and technical assistance;
- Conditioning the award of future sole source 8(a) contracts on the concern's taking affirmative steps to expand revenues from non-8(a) sources;
- Reducing the concern's level of 8(a) support;
- Eliminating sole source 8(a) contracts; or
- Terminating the concern's participation in the 8(a) program.

Besides failing to meet non-8(a) business activity goals during the transitional stage, an 8(a) concern's participation may be terminated if, for example:

- It fails to maintain its small business status;
- It fails to maintain the 51% ownership requirement;
- It fails to provide the SBA with required financial statements, business plans, or reports;

- An owner has a net worth of more than **$750,000**, excluding his ownership interest in the applicant concern and equity in his primary residence;
- It ceases business operations;
- It is debarred or suspended; or
- It knowingly submits false information to the SBA.

There are many other grounds for a concern's termination from the 8(a) program.

In addition, once an 8(a) concern receives more than **$100,000,000** in both sole source and competitive 8(a) contracts (or, if the firm is primarily engaged in an industry with a revenue-based small business size standard, five times that size standard or $100,000,000, whichever is less), SBA will no longer award it any *sole source* 8(a) contracts. Nevertheless, the 8(a) concern can still compete for competitive 8(a) acquisitions (that is, those above $5,500,000 for manufacturing; those above $3,500,000 for services or construction). However, 8(a) contracts under **$100,000** are *not* counted against the $100,000,000 / 5 times the size standard limitation.

Clauses in 8(a) Solicitations and Contracts

Solicitations under the 8(a) program are *not* synopsized in the **FedBizOpps** except for competitive 8(a) solicitations (that is, those that exceed $5,500,000 for manufacturing or $3,500,000 for services and construction). Competitive 8(a) solicitations contain **FAR 52.219-17, Section 8(a) Award**, and **FAR 52.219-18, Notification of Competition Limited to Eligible 8(a) Concerns**. All 8(a) contracts contain FAR 52.219-14, Limitations on Subcontracting.

Contracts awarded under the 8(a) program count toward an agency's SDB contract award goal.

See FAR Subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), and **http://www.sba.gov/8adb** for further information on 8(a) program contracting procedures.

DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM

A program very similar to SBA's 8(a) program is the Department of Transportation (DOT) **Disadvantaged Business Enterprise (DBE) Program**. The DBE program is intended to provide contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals in DOT's highway, mass transit, and airport financial assistance programs operated by the Federal Highway Administration, the Federal Transit Administration, and the Federal Aviation Administration, respectively.

The DBE program requires state and local transportation agencies that receive DOT financial assistance to establish goals for the participation of DBEs – the overall

goal is for DBEs to receive at least 10% of the financial assistance. Each DOT-assisted state and local transportation agency is required to establish annual DBE goals, and to review anticipated large prime contracts throughout the year and establish contract-specific DBE subcontracting goals.

Most of the qualifications for participation in the 8(a) program and the DBE program are the same, so both programs have created a standard uniform application form and a reciprocal certification process. However, there are some differences between the two programs – for example, women-owned small businesses are considered disadvantaged under the DBE program, and the two programs have different limits on owners' net worth and firms' gross revenue (there are even different size standards for airport concessionaires under the DBE program). Furthermore, there are the usual quirks – Alaska-Native Corporations must be certified as DBEs even if they do not meet the size, ownership, and control criteria that apply to other DBEs (such as Indian tribes and Native Hawaiian Organizations). So those interested in the DBE program should to look at the applicable regulations and contact the applicable DOT administrations to determine whether they are qualified.

DOT's DBE website is **http://osdbu.dot.gov/business/dbe/dbe_program.cfm**. The DBE program regulations are in Title 49 of the Code of Federal Regulations (CFR), Part 23, Participation by Disadvantaged Business Enterprises in Airport Concessions; and 49 CFR Part 26, Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.

HISTORICALLY UNDERUTILIZED BUSINESS ZONE (HUBZone) PROGRAM

Another program designed to help small businesses is the **Historically Underutilized Business Zone (HUBZone) Program**. It is intended to help small business concerns (SBCs) in economically distressed communities obtain federal contracts. A HUBZone is an area of high unemployment (with an unemployment rate at least 140% of the state's average) or low income (no more than 80% of the non-metropolitan state median household income). To qualify as a HUBZone SBC, a firm must be small, be 51% owned and controlled by U.S. citizens, have its principle office in a HUBZone, and have at least 35% of its employees reside in a HUBZone. HUBZone SBCs must be certified by the SBA as meeting the HUBZone requirements. The CCR database identifies all certified HUBZone SBCs, and the HUBZone website at **https://eweb1.sba.gov/hubzone/internet** allows individuals to check whether a particular address is in a HUBZone (9,000 urban census tracts, 900 rural counties, and all Indian reservations are HUBZones).

Firms that are certified as HUBZone small businesses are identified as such in the CCR database. If the firm's CCR entry does not indicate it is HUBZone certified, *it is not HUBZone certified!*

Contracting officers are required to **set-aside acquisitions over $100,000** for HUBZone SBCs if there is a reasonable expectation of receiving two or more offers from HUBZone SBCs and award will be made at a fair market price (the "rule of two" again). *This takes precedence over small business set-asides, and it overrides the prohibition against the use of small business set-asides for acquisitions in certain industries under the Small Business Competitiveness Demonstration Program* (see below). Contracting officers *may* set-aside acquisitions between the micro-purchase threshold and $100,000 under these same conditions.

Contracting officers are permitted to award **sole source contracts** to HUBZone SBCs if only one HUBZone SBC can satisfy the requirement, the contract is greater than $100,000 but less than $5,500,000 for manufacturing contracts or $3,500,000 for all other contracts, the contract is not currently being performed by a non-HUBZone SBC, and award will be made at a fair market price.

In addition, contracting officers are required to apply a **10% price evaluation preference** to offers from HUBZone SBCs in acquisitions over $100,000 that are conducted using full and open competition. However, the preference may not be used where price is not a selection factor (as in architect-engineer contracts), nor can it be applied when the successful offeror is a non-HUBZone small business.

Solicitations that are set aside for HUBZone SBCs contain **FAR 52.219-3, Notice of Total HUBZone Set-Aside**. Solicitations and contracts conducted using full and open competition contain **FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns**.

For more on the HUBZone program, see FAR Subpart 19.13. An electronic application, special mapping software that helps determine if an address or area is in a HUBZone, and additional information on the HUBZone program is available at **https://eweb1.sba.gov/hubzone/internet**. Also, see Chapter 17 for protests concerning HUBZone program eligibility.

SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESS PROGRAM

On December 16, 2003, President Bush signed the **Veterans Benefits Act of 2003** (Public Law 108-183). Section 308, Procurement Program for Small Business Concerns Owned and Controlled by Service-Disabled Veterans, amends the Small Business Act to establish a service-disabled veteran-owned small business (SDVOSB) set-aside program that is essentially the same as the HUBZone sole source and set-aside programs.

Contracting officers *may* **set aside acquisitions** for SDVOSBs "if the contracting officer has a reasonable expectation that not less than two small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price." Note that SDVOSB set-asides are *optional*

(the word "may"), while HUBZone set-asides are *mandatory* if the conditions are met (the word "must").

Contracting officers *may* award a **sole source contract** to an SDVOSB if does *not* have a reasonable expectation that two or more qualified SDVOSBs will submit offers at a fair market price, and the contract does not exceed $5,500,000 for manufacturing or $3,000,000 for all other industries (note the $3,000,000 limitation for non-manufacturing industries is different than the $3,500,000 limitation on 8(a) and HUBZone sole source contracts).

Unlike offers from HUBZone SBCs, the legislation does *not* provide for the application of a 10% price evaluation preference to SDVOSB offers.

Solicitations that are set aside for SDVOSBs contain **FAR 52.219- 27, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside**.

For more on the SDVOSB program see FAR Subpart 19.14, Service-Disabled Veteran-Owned Small Business Procurement Program.

WOMEN-OWNED SMALL BUSINESSES

Though there is a 5% goal for contract and subcontract awards to small businesses that are at least 51% owned by women, there are no "women-owned small business set-asides" or other preference programs (other than DOT's Disadvantaged Business Enterprise program mentioned above). However, to achieve the 5% goal, agencies have special "outreach" programs, and provide counseling and assistance. Also, most women-owned businesses are small, so they can participate under one or more of the small business programs. In addition, women-owned small businesses are authorized to participate in "mentor-protégé programs" where they exist (see below).

DISASTER RELIEF AND EMERGENCY ASSISTANCE SET-ASIDES

In the wake of the inadequate government response to Hurricanes Katrina, Rita, and Wilma in 2005, Congress authorized the use of set-asides for major disaster or emergency assistance acquisitions. When the president declares a disaster or emergency, contracting officers *may* set-aside acquisitions for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance for contractors residing or doing business primarily in the geographic area affected by the disaster or emergency (note that contracting officers are *not required* to set-aside such acquisitions).

The contracting officer defines the specific geographic area for the set-aside, but the geographic area must be within the declared disaster or emergency area (or areas). However, the area need not include all the counties in the declared disaster or emergency areas – the set-aside may cover the entire declared areas or some part of the ar-

eas (for example, one or more counties, and the set-aside area may cross state lines). These set-asides may be used with other set-asides, such as those for small businesses – the contracting officer may set-aside an acquisition for small businesses within the disaster or emergency area.

For more on disaster relief and emergency assistance set-asides, see FAR Subpart 26.2, Disaster or Emergency Assistance Activities.

SUBCONTRACTING INCENTIVES

Before a contracting officer can award to a large business a contract that is greater than $550,000 ($1,000,000 for construction) and that has subcontracting opportunities, he must require the large business to submit and negotiate a **small business subcontracting plan**. The small business subcontracting plan must include separate goals for subcontract awards to small businesses, veteran-owned small businesses, SDVOSBs, HUBZone small businesses, SDBs, and women-owned small businesses; the name of the person who will administer the subcontracting program for the large business; and a description of the efforts the large business will make to insure small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, SDBs, and women-owned small businesses have an equitable opportunity to compete for subcontracts. If the large business fails to submit a subcontracting plan when requested or fails to negotiate an acceptable subcontracting plan, it is *ineligible* for award. (**NOTE:** See above for the evaluation of proposed SDB subcontracting in certain industries designated by the Department of Commerce (DOC) as having "persistent and significant underutilization of minority firms.")

Once the contracting officer and the successful large business negotiate an acceptable subcontracting plan, the plan becomes part of the contract, and the contractor must report its subcontracting achievements annually (semiannually for Department of Defense contractors) through the **Electronic Subcontracting Reporting System** (eSRS) (**http://www.esrs.gov**). Any contractor failing to comply "in good faith" with the subcontracting plan is liable to *liquidated damages* equal to the actual dollar amount by which the contractor fails to achieve each subcontract goal.

However, when the contracting officer decides the inclusion of a **monetary incentive** is necessary to increase small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, and women-owned small business subcontracting opportunities, he can authorize an additional payment up to **10%** of the amount the contractor exceeds each subcontract goal in its subcontract plan. The amount of the incentive is negotiated and depends on the contractor's unique outreach programs; its use of small businesses, veteran-owned small businesses, SDVOSBs, HUBZone small businesses, SDBs, and women-owned businesses in nontraditional areas; and the technical assistance it intends to provide small busi-

nesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, and women-owned businesses. Nevertheless, the contracting officer will *not* give the contractor an incentive bonus if (1) the contractor exceeds a subcontract goal because of a reason not under its control (such as a subcontractor overrun), or (2) the contractor exceeds a subcontract goal but it did not disclose in its subcontracting plan all the subcontracts it had intended to award to small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, SDBs, and women-owned businesses. (**NOTE:** See above for monetary incentives that may be used to encourage SDB subcontracting opportunities in certain industries designated by the Department of Commerce (DOC) as having "persistent and significant underutilization of minority firms.")

In addition, contracting officers are to consider each offeror's past compliance with its subcontracting plans when evaluating the offeror's past performance (see Chapter 8).

For DOD, two additional provisions apply: (1) subcontract awards to qualified **nonprofit agencies for the blind and the severely handicapped** under DOD contracts count toward the contractor's small business goal; and (2) it is conducting a test program through September 30, 2010, to determine whether **comprehensive subcontracting plans** on a corporate, division, or plant-wide basis will increase subcontracting opportunities for small businesses.

Unrestricted solicitations expected to exceed $500,000 (or $1,000,000 for construction) contain **FAR 52.219-9, Small Business Subcontracting Plan**, and **FAR 52.219-16, Liquidated Damages – Subcontracting Plan**. If the contracting officer decides a monetary incentive is necessary, he will include **FAR 52.219-10, Incentive Subcontracting Program**.

Many large businesses use the CCR database to identify qualified small businesses, veteran-owned small businesses, SDVOSBs, HUBZone small businesses, SDBs, and women-owned businesses that might be suitable as subcontractors, thus helping them meet or exceed their subcontracting goals. Also, many large businesses use the SBA website **SUB-*Net*** (**http://web.sba.gov/subnet**) to post subcontracting opportunities (it is also used by federal agencies, state and local governments, non-profit organizations, colleges and universities, and even foreign governments). While these subcontracting opportunities are not necessarily reserved for small businesses, small businesses are able to identify potential subcontracts in their areas of expertise and use their limited resources pursuing the most promising.

When awarding subcontracts, contractors may rely on the representations of the subcontractors regarding their status as small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, and women-owned small businesses. However, contractors are obligated to confirm the status of subcontractors claiming to be HUBZone concerns by accessing the CCR database and verifying that SBA has "certified" them (see above).

See FAR Subpart 19.7, The Small Business Subcontracting Program, for more information on subcontracting with small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, SDBs, and women-owned small businesses.

American Indian Incentive Program

To provide prime contractors with an incentive to subcontract with American Indian organizations and Indian-owned economic enterprises, contracting officers *may* include in contracts an incentive payment equal to **5% of the amount paid to an Indian subcontractor**. If the contracting officer believes subcontracting opportunities exist for Indian organizations or Indian-owned economic enterprises, and money is available to pay the incentive, then the contracting officer *may* include **FAR 52.226-1, Utilization of Indian Organizations and Indian-Owned Economic Enterprises**, in solicitations and contracts of any amount.

See FAR Subpart 26.1, Indian Incentive Program, for more on the Indian subcontracting incentive.

MENTOR-PROTÉGÉ PROGRAMS

In 1990, Congress authorized DOD to develop a program to provide its major contractors with incentives to enter into agreements with small firms in which the major contractor agrees to provide appropriate developmental assistance to the small firm to enhance its ability to compete for, and successfully perform, DOD contracts and subcontracts. In return, Congress authorized DOD to reimburse the major contractors for the cost of developmental assistance provided to the small firms, or to credit the developmental assistance costs against its subcontract goals (see above).

DOD developed a **mentor-protégé program** in which the major contractor (“mentor”) selects one or more small firms (“protégé”) to enter into a long-term relationship as a junior partner. DOD’s mentor-protégé program worked so well that Congress authorized the National Aeronautics and Space Administration (NASA) to develop a similar one (in fact, the two agencies recognize each other’s mentor-protégé agreements, and allow credits earned under one agency’s contracts to be counted against the mentor’s subcontract goals under the other agency’s contracts). Later, in 1996, when Congress exempted the Federal Aviation Administration (FAA) from the requirements of the FAR, the FAA instituted a mentor-protégé program that is similar to DOD’s and NASA’s. Also, in 2003 when Congress authorized the creation of the Department of Homeland Security and gave it wide latitude in establishing its acquisition processes, the Department instituted a mentor-protégé program that resembles DOD’s and NASA’s.

Other agencies, though not authorized by Congress to spend funds on a mentor-protégé program, have developed their own "no-cost" programs. Under such programs, the agency does not reimburse the mentor for any protégé developmental costs, but instead provides its mentors with additional consideration during the proposal evaluation process. These agencies are the Departments of Energy, State, and Treasury, the Environmental Protection Agency (EPA), and the United States Agency for International Development (USAID).

In addition, the SBA has developed a mentor-protégé program in which the protégés are restricted to 8(a) program participants, and the mentor-protégé team can submit bids and proposals as a small business for *any government procurement* if certain conditions are met.

Typically, the mentor firm is a large business, though some agencies permit larger small businesses to participate as mentors. Each agency has different qualification requirements for participation as a protégé:

Agencies with "Cost-Reimbursement" Programs

- **DOD:** SDBs, business entities owned and controlled by Indian tribes and Native Hawaiian Organizations, and women-owned small businesses.
- **NASA:** SDBs, Historically Black Colleges or Universities (HBCUs) or Minority Institutions (MI), and women-owned small businesses.
- **Homeland Security:** small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, SDBs, and women-owned small businesses.
- **FAA:** SDBs, HBCUs or MIs, and women-owned small businesses.

Agencies with "No-Cost" Programs

- **Energy:** 8(a) program participant, SDBs, HBCUs or MIs, service-disabled veteran-owned small businesses, and women-owned small businesses.
- **State:** small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, SDBs, and women-owned small businesses.
- **Treasury:** small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, SDBs, and women-owned small businesses.
- **EPA:** SDBs, HBCUs or MIs, and women-owned small businesses.
- **USAID:** small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, SDBs, and women-owned small businesses.

To become a mentor, a firm must apply to an agency and be approved by the agency's Office of Small and Disadvantaged Business Utilization (OSDBU) ("Office

of Small Business Programs" in the Department of Defense). Though all agencies' application processes are different, a mentor applicant typically must provide the amount of all contracts and subcontracts it received during the previous several years; the amount of all subcontracts the applicant awarded during the previous several years (broken down by type of small business); a description of the nature and extent of technical and managerial support the firm proposes to provide its protégés; and other developmental assistance it proposes to provide, such as equity investments, loans, joint-venture support, and subcontracting support.

If a firm is approved to be a mentor, it is responsible for picking its own protégés (a mentor can have more than one protégé, buy protégés normally can have only one mentor). The selection of the protégé by a mentor may not be protested, except that the size status or eligibility of a protégé may be protested, in which case the mentor must forward the protest to the SBA for resolution (see Chapter 17 for more on protests concerning size status).

To participate under the agency's mentor-protégé program, the mentor and protégé must execute an agreement and receive the agency OSDBU's approval before obtaining reimbursement for any development costs, subcontracting credits, additional evaluation consideration, or any other benefits under the program.

The mentor-protégé agreement generally includes the following elements:

- The name, address, telephone number, and point of contact for the mentor and protégé firms
- The NAICS code or codes of the supplies or services expected to be provided by the protégé to the mentor
- Duration of the agreement
- Forms of developmental assistance the mentor will provide the protégé, such as:
  - Management guidance (financial, organizational, business development, marketing)
  - Engineering and other technical assistance
  - Noncompetitive awards of subcontracts
  - Awards of subcontracts in the mentor's commercial activities
  - Rent-free use of facilities and equipment owned or leased by the mentor
  - Temporary assignment of mentor personnel to the protégé for training purposes
- A schedule for providing the assistance
- The number, types, and estimated amount of subcontracts to be awarded to the protégé
- Reporting requirements
- Criteria for evaluation of the protégé's development
- Procedures should allow either the mentor or the protégé unilaterally to terminate its participation in the agreement

- Procedures should allow the agency to terminate its recognition of the agreement for good cause (such termination of recognition does not terminate any subcontracts between the mentor and the protégé)
- Any other necessary terms and conditions

Once the agency's OSDBU approves the mentor-protégé agreement, the mentor may begin providing developmental assistance to the protégé, and receiving benefits.

- Under the "cost-reimbursement" type of mentor-protégé program (DOD, NASA, Homeland Security, and FAA), the agency usually establishes a separately priced line item in one of its contracts and reimburses the mentor under that line item. Developmental assistance costs that are not reimbursed under this line item may be credited to the mentor's applicable small business subcontracting goal.
- Under the "no-cost" type of mentor-protégé program (Energy, State, Treasury, EPA, and USAID), proposals submitted under the mentor-protégé agreement receive a "bonus" during proposal evaluation – for example, Treasury increases, by up to 5% of the relative importance assigned to the technical/management factors, the evaluation score of a proposal submitted by a mentor-protégé team.

Periodically (annually, semi-annually, quarterly), both the mentor and protégé must submit reports to the agency's OSDBU explaining the actions taken to further the protégé's progress, assessing the protégé's performance and progress, and describing the additional efforts needed to make sure the protégé achieves the goals identified in the approved agreement. The OSDBU reviews the reports and decides whether to allow the agreement to remain in force or to terminate the agency's recognition of the agreement.

For more on the various mentor-protégé programs, see the participating agencies' FAR supplements (usually in Part 19 of the supplement).

SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM

There is a deceptively titled program called the **Small Business Competitiveness Demonstration Program** that actually *prohibits* set-asides of contracts over **$30,000** for certain services in **five industries** (over $50,000 for architecture and engineering (A-E) services). The purpose of the program is to "assess the ability of small businesses to compete successfully in certain industry categories without competition being restricted by the use of small business set-asides." However, the program also establishes a set-aside for businesses that are no greater than **50% of the applicable small business size standard** – the "**emerging small business (ESB) set-aside**." In addition, each participating agency must "target" **ten industry categories** for in-

creased management attention and specifically tailored acquisition procedures to increase small business participation. So, the Small Business Competitiveness Demonstration Program is a mixed bag.

Participating Agencies

The Small Business Competitiveness Demonstration Program does *not* apply to all federal agencies. Congress has designated the following agencies as participants:

- Department of Agriculture
- Department of Defense (except the National Geospatial-Intelligence Agency)
- Department of Energy
- Department of Health and Human Services
- Department of the Interior
- Department of Transportation
- Department of Veterans Affairs
- Environmental Protection Agency
- General Services Administration
- National Aeronautics and Space Administration

Designated Industry Groups

Congress has designated the following five industries as "**designated industry groups**" (DIGs) to which the program applies:

- **Construction** (excluding dredging), under:
  - NAICS Subsector 233, **Building, Developing, and General Contracting**
  - NAICS Subsector 234, **Heavy Construction**
  - NAICS Subsector 235, **Special Trade Contractors**
  - NAICS Subsector 236, **Construction of Buildings**
  - NAICS Subsector 237, **Heavy and Civil Engineering Construction**
  - NAICS Subsector 238, **Specialty Trade Contractors**
- **Refuse Systems and Related Services** (solid and other waste, trash and garbage collection)
- **Architectural and Engineering Services** (including surveying and mapping)
- **Nonnuclear Ship Repair** (including overhauls and conversions)
- **Landscaping and Pest Control Services**

Exceptions

The Small Business Competitiveness Demonstration Program does *not* apply to awards under the Section 8(a) program or the HUBZone program (see earlier in this chapter for an explanation of these programs), to Department of Defense contracts less than **$300,000** that are for architect-engineering services in support of military construction projects or military family housing projects, to orders placed against Federal Supply Schedule contracts (see Chapter 13), or to contract awards to educational or nonprofit organizations or governmental entities.

Agency Failure to Meet Small Business Goal in a Designated Industry Group

A participating agency may not use small business set-asides when soliciting for contracts over $30,000 in these DIGs (over $50,000 for A-E services), *unless* it fails to award small businesses **40%** of its contract dollars spent for services in a DIG. If a participating agency fails to attain its 40% goal for any DIG, its **organizational units** that failed to attain the goals must solicit subsequent contracts through small business set-asides until the agency meets the goal. "Organizational units" may be no *larger* than the agency's major components or services. For example, the Department of Defense organizational units are the Army, Navy, and Air Force; the General Services Administration (GSA) organizational units are its regional offices. This means if GSA fails to meet the 40% goal for small business awards for refuse services, and Regions 3 and 7 are the ones that caused GSA to miss the goal, all refuse services solicitations issued by Regions 3 and 7 must be set aside for small businesses until GSA reaches the 40% goal.

Emerging Small Business Goals

The program also assigns each agency a **15% goal for awards in each DIG to emerging small businesses** (ESB), defined as those no larger than 50% of the applicable small business size standard. Awards to ESBs count toward the 40% small business goal, but failure to meet the 15% goal does not automatically initiate "ESB set-asides," unlike an agency's failure to meet the 40% small business goal which initiates small business set-asides.

Paragraph (c) of FAR 19.1007, Procedures, requires contracting officers to set aside purchases in the DIGs of **$30,000 or less** for ESBs ($50,000 or less for A-E services) if the contracting officer decides there is a "*reasonable expectation of obtaining offers from two or more responsible ESBs that will be competitive in terms of market price, quality, and delivery*" (the "rule of two" again). However, if an agency fails to meet the 15% ESB contract award goal in a DIG, the ESB set-aside threshold may be *increased*, thus requiring ESB set-asides for solicitations up to the higher

threshold. This higher threshold remains in effect until the agency reaches the 15% goal.

Targeted Industry Categories

Finally, the program requires each participating agency to select **ten targeted industry categories** for expanded small business participation. These targeted industry categories must represent supplies and services that are bought in substantial quantities by the agency but have a small business participation rate of **less than 10%**. The agencies select their targeted industry categories after consulting with SBA and developing a plan for expanding small business participation.

For example, DOD has identified the following as its 10 targeted industry categories:

1. Pharmaceutical Preparation Manufacturing (NAICS 325412)
2. Ammunition (except Small Arms) Manufacturing (NAICS 332993)
3. Other Ordnance and Accessories Manufacturing (NAICS 332995)
4. Turbine and Turbine Generator Set Unit Manufacturing (NAICS 333611)
5. Aircraft Engine and Engine Parts Manufacturing (including Research and Development) (NAICS 336412)
6. Guided Missile and Space Vehicle Manufacturing (including Research and Development) (NAICS 336414)
7. Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing (including Research and Development) (NAICS 336419)
8. Military Armored Vehicle, Tank and Tank Component Manufacturing (NAICS 336992)
9. Search and Navigation System and Instrument Manufacturing (NAICS 334511)
10. (i) Cellular and Other Wireless Communications (NAICS 517212)
    (ii) Satellite Communications (NAICS 517410)
    (iii) Other Telecommunications (NAICS 517910)

Each of the other participating agencies has published its 10 targeted industry categories in its FAR supplement. Each participating agency's SADBUSs can identify the 10 targeted industry categories and provide assistance to small businesses.

Clauses

In addition to FAR 52.219-1, Small Business Program Representations, solicitations in the five DIGs contain **FAR 52.219-19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program**. Solicitations that are set aside for ESBs contain **FAR 52.219-20, Notice of Emerging Small Business Set-Aside**. Solicitations in each of an agency's 10 targeted industry catego-

ries contain **FAR 52.219-21, Small Business Size Representation for Targeted Industry Categories under the Small Business Competitiveness Demonstration Program**.

See FAR Subpart 19.10 for more information on the Small Business Competitiveness Demonstration Program.

SMALL BUSINESS INNOVATION RESEARCH (SBIR) PROGRAM

There is a preference program called the **Small Business Innovation Research (SBIR) Program** which requires all agencies with research and development budgets of more than **$100 million** to set aside a **2.5%** of their research and development budgets for small businesses. Approximately **$2 billion** is awarded to small businesses through the SBIR program each year.

In effect, the SBIR program is a research and development small business set-aside. The solicitations, proposal requirements, and regulations are simplified under this program to make it easier for small businesses to participate in government research and propose innovative approaches in areas of technology and research that interest the government. It is a trial program that is scheduled to expire September 30, 2008, but it is expected to be reauthorized by Congress.

Participating Agencies and SBIR Requirements

The following 11 agencies take part in the SBIR program:

- Department of Agriculture
- Department of Commerce
- Department of Defense
- Department of Education
- Department of Energy
- Department of Health and Human Services
- Department of Homeland Security
- Department of Transportation
- Environmental Protection Agency
- National Aeronautics and Space Administration
- National Science Foundation

Each of these agencies must award at least **2.5%** each fiscal year until termination of the program. Under the SBIR program, a small business is defined as a concern with no more than **500 employees** (regardless of the applicable small business size standard) and is at least **51%** owned by U.S. citizens.

SBIR Phases

The SBIR program consists of **three phases**:

Phase I

Under Phase I of the SBIR program, an agency identifies topics in areas of research and technology that directly affect its functions and are suitable for small business participation. At least once a year (and more often if necessary), the agency prepares an SBIR solicitation. If the solicitation is expected to result in SBIR contracts exceeding $25,000, it must be synopsized in **FedBizOpps** at least 15 days before the solicitation is issued, and the solicitation must have a proposal due date that is at least 30 days after the solicitation is released.

The solicitation is not in the uniform contract format. Rather, it is in a "simple, standardized, easy-to-read, easy-to-understand format" that identifies the research topics in sufficient detail so potential small businesses know the agency's research goals.

The solicitation requires the small business offeror to submit a proposal, no longer than **25 single-spaced typewritten pages**, that describes an effort up to **six months** long and costing no more than **$100,000** to conduct experimental or theoretical research related to one of the agency's topics. The 25 pages must include the following:

- A brief abstract of the technical problem;
- The technical questions the proposed research will address;
- A work plan;
- A description of the related research previously performed by the small business;
- The key personnel who will perform the research and a bibliography of their related work;
- A description of the facilities the small business will use;
- The qualifications of any consultants who will assist in the research;
- Anticipated results of the proposed research;
- How the research will provide a basis for further funding (see Phase II below); and
- The potential commercial applications.

In addition, the small business must agree to perform at least **two-thirds** of the research or analytical effort.

An effort of this size permits the small business contractor to demonstrate the scientific merit and technical feasibility of its proposed effort, and for the government to judge the quality of the small business' execution. The government may decide to award contracts to more than one offeror if several different solutions and approaches have technical and scientific merit.

The SBA publishes a **Phase I Program Pre-Solicitation Announcement** (PSA) periodically. The SBIR PSA contains a list of topics, by agency, for which SBIR proposals will be sought. The SBIR PSA is available electronically at **http://www.sba.gov/sbir/indexprograms.html**.

In addition, the SBA has the publication **SBIR Proposal Preparation Handbook**, which is available at **http://www.sba.gov/aboutsba/sbaprograms/sbir/sbirstir/index.html**, and the **SBIR World** website at **http://www.sbirworld.com** (sponsored by the National Science Foundation) provides news, dates of national and regional SBIR conferences, solicitations, and other useful information.

Phase II

If the results of the Phase I contract are promising, the agency has the option of funding a Phase II of the research. Phase II expands on the Phase I results and allows the small business contractor to further pursue development of the research. Each agency selects the small business contractors it wants to submit proposals; only those contractors that participated in Phase I are eligible for Phase II (the **FedBizOpps** synopsis requirement does not apply to Phase II proposals). Proposals for Phase II funding may not be longer than **two years** or cost more than **$750,000**. The small business must agree to perform at least **one-half** of the research or analytical effort. However, the agency has *no obligation* to fund *any* Phase II proposal, even if Phase I is successfully completed.

Phase III

Once Phase II is completed, the small business is encouraged to pursue commercial applications of the research through private funding under **Phase III**. If Phase II results in a product or process that meets the need of a federal agency, the agency is free to award a non-SBIR contract to the small business for the product, process, or additional research. No SBIR funds may be used for Phase III.

The SBIR program is not addressed in the FAR. For more information on the SBIR program, contact the agency's SBIR representative or one of the SBA's regional offices. The SBA's SBIR website is located at **http://www.sba.gov/aboutsba/sbaprograms/sbir/sbirstir/sbir_sbir_description.html.**

SMALL BUSINESS TECHNOLOGY TRANSFER (STTR) PROGRAM

The **Small Business Technology Transfer Program** (STTR) is similar to the SBIR in that all agencies with research and development budgets of more than **$1 billion** are required to set aside **0.3%** of their research and development budgets for small businesses. Approximately **$200 million** is awarded to small businesses through

the STTR program each year. The STTR program is scheduled to expire September 30, 2009.

The following agencies participate in the STTR program:

- Department of Defense
- Department of Energy
- Department of Health and Human Services
- National Aeronautics and Space Administration
- National Science Foundation

The primary difference between the SBIR and the STTR programs is that small businesses *must* have a research institution as a partner to participate in the STTR program. The SBA describes the reason for the STTR program like this:

> "Small business has long been where innovation and innovators thrive. But the risk and expense of conducting serious R&D efforts can be beyond the means of many small businesses. Conversely, nonprofit research laboratories are instrumental in developing high-tech innovations. But frequently, innovation is confined to the theoretical, not the practical. STTR combines the strengths of both entities by introducing entrepreneurial skills to high-tech research efforts. The technologies and products are transferred from the laboratory to the marketplace. The small business profits from the commercialization, which, in turn, stimulates the U.S. economy."

Like the SBIR program, the STTR program consists of three phases:

- ***Phase I*:** An agency solicits proposals or grant applications from small businesses and their research partners to conduct feasibility-related experimental or theoretical research related to described agency requirements up to **one year** long and costing no more than **$100,000**. The agency may make more than one award if several different approaches have merit.

  As with the SBIR program, if the STTR solicitation is expected to result in contracts exceeding $25,000, it must be synopsized in **FedBizOpps** at least 15 days before the solicitation is issued, and the solicitation must have a proposal due date that is at least 30 days after the solicitation is released.

- ***Phase II*:** If the results of Phase I are promising, the agency may provide further funding to allow the small business and its research partner to expand and develop the research. The effort may be up to **two years** and cost no more than **$750,000**. However, the agency is under no obligation to fund a Phase II effort.

- ***Phase III*****:** The agency may enter into a non-STTR funded agreement with the small business or contract with the small business for additional work. Phase III small businesses are encouraged to obtain non-federal funds for commercial applications of the research.

For more information on the STTR program, contact the agency's STTR representative or visit SBA's STTR website at **http://www.sba.gov/aboutsba/sbaprograms/sbir/sbirstir/sbir_sbir_description.html.**

FALSE STATEMENTS OR INFORMATION

Many of these set-asides and preference programs rely on the bidder's or offeror's representation that it is eligible. Others, such as applications for HUBZone certification, require the concern to submit personal and financial information about itself and its owners as part of its application. Participants in the 8(a) program must file annual reports and certifications to maintain their eligibility.

Anyone who misrepresents his concern's average annual gross revenue, number of employees, ownership, or other qualifying characteristics to obtain a set-aside contract or preference is subject to a fine up to **$500,000**, imprisonment up to **10 years**, suspension and debarment, penalties authorized by the Program Fraud Civil Remedies Act of 1986 ($5,500 for each false statement), and ineligibility to participate in any program or activity under the Small Business Act for up to **three years**. This is considered ***serious business***! See Chapter 18 for more on procurement integrity and ethics.