

Department of the Air Force

Integrity - Service - Excellence

Major Legal Policy Initiatives Involving Small Business



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Small Business Training Week
"Blue Day"
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Topics Overview



1. **The SBA FY20 Annual Scorecard**
 - **Reporting methods, SB industrial base tracking by NAICS, SBIR/STTR rating element for SB Directors**
2. **The Small Disadvantaged Business (SDB) Initiative**
 - **Increasing SDB spend and related goals**
3. **Executive Orders on Equity (13985 and 14031)**
 - **Goaling, Category Management, Agency Equity Plans**
4. **Executive Order on Competition (14036)**
 - **Plan with competition recommendations**
5. **Executive Orders on Buy American (14005) and Supply Chains (14001 and 14017)**
 - **Made in America Waivers, Plans, and White House Supply Chain Review**
6. **Summary: Implications for Small Business Professionals**



The SBA FY20 Annual Scorecard: Overview



- **Scorecard released 28 July 2021, with the following scores for 24 CFO Act agencies:**
 - Government-Wide: **A** rating, 109.22%; DoD: **A** rating, 102.71%
 - 8 agencies (DoC, DHS, DoL, DoS, DoI, OPM, GSA, SBA): **A+**
 - 11 agencies (USDA, DoD, DoJ, Treasury, DoT, VA, EPA, NASA, NSF, NRC, SSA): **A**
 - 3 agencies (USAID, DoE, HSS) : **B**
 - 1 agency (DEd): **C**; 1 agency (HUD): **D**

- **Scorecard methodology (largely continued from FY2019)**

Areas	% Grade
Prime Contracting Achievement	50% of Scorecard Grade
Subcontracting Achievement	20% of Scorecard Grade
Comparison of the Number of Small Business Prime Contractors in each of the Five Small Business Categories in the Agency's Top 100 Small Business NAICS Codes Between FY 2019 and FY 2020	10% of Scorecard Grade
OSDBU Peer Review on Agency Compliance with Section 15(k) of the Small Business Act (21 requirements)	20% of Scorecard Grade

- **Implications:** The SBA scorecard process is a good opportunity for process and policy improvements at DoD and MILDEP levels. While scorecards are tracked by Congress, this is a gentler, less-intrusive review of SB-OSDBU issues typically reviewed by the GAO.



The SBA FY20 Annual Scorecard: Details of 4 Rating Elements



- **DoD prime contracting achievements (50%):**
 - **Double credit for:** 15 U.S.C. 644(f) (prime contracts in disaster areas awarded as a local area set aside and a small business or other socio-economic set aside when the vendor state is the same as the place of performance; and 15 U.S.C. 644(x) (awards to SBs with principal office in PR, USVI, AS, GU, CNMI)
 - **Exclusions:** leases, foreign funding, humanitarian and contingency operations, foreign place of both award and performance, Tricare, host nation agreement, etc. (see complete list and definitions in Appendix C to SBA FY20 Goaling Guidelines)

Prime Contracting Achievement:			55.68%
	2019 Achievement	2020 Goal	2020 Achievement ^{1, 2}
Small Business	24.16%	22.05%	24.50% (\$80.4 B)
Women Owned Small Business	4.25%	5.00%	4.05% (\$13.3 B)
Small Disadvantaged Business	8.56%	5.00%	9.26% (\$30.4 B)
Service Disabled Veteran Owned Small Business	3.25%	3.00%	3.22% (\$10.6 B)
HUBZone	1.88%	3.00%	2.20% (\$7.2 B)

- **Implications:** 15 U.S.C. 644(h)(1)(D) requires DoD to prepare a remediation plan for WOSB and HUBZone goals with analysis of contributing factors and proposed new practices
- **Compare to government-wide:** \$145.7 B (26.02%); also missed WOSB and HUBZone goals



The SBA FY20 Annual Scorecard: Details of 4 Rating Elements



■ DoD subcontracting achievements (20%):

- **Source:** Based on agency Subcontracting Report (SBA version) from eSRS
- **Calculation and reporting:** Like prime contracting achievements, subcontracting achievements are weighed based on a percentile-based “achievement score” (goal achievement divided by goal) times a percentage weights for the goal, with all results added to achieve a total score

Subcontracting Achievement:			18.93%
	2019 Achievement	2020 Goal	2020 Achievement ¹
Small Business	38.60%	32.00%	33.40% (\$55.1 B)
Women Owned Small Business	5.20%	5.00%	5.40% (\$8.9 B)
Small Disadvantaged Business	4.00%	5.00%	4.10% (\$6.8 B)
Service Disabled Veteran Owned Small Business	2.10%	3.00%	2.20% (\$3.7 B)
HUBZone	1.60%	3.00%	1.70% (\$2.8 B)

- **Implications:** Although DoD OSBP has not assigned subcontracting goals to the DAF in the past, explore obtaining SBA’s report from eSRS for tracking purposes



The SBA FY20 Annual Scorecard: Details of 4 Rating Elements



- DoD SB industrial base composition (number of SB primes in 5 categories across top 100 NAICS) (10%)** (ref. 15 U.S.C. 644(g)(2)(D): *“In establishing goals . . . , the head of each Federal agency shall make a consistent effort to annually expand participation by small business concerns from each industry category”* in agency contracts and subcontracts)
 - Score:** SBA divides sums of scores by 5, and then applies the resulting percentile share to the percentage weight, enabling full credit even with mixed trends
 - DoD Comment:** *“DoD will prioritize the use of the [PTACs] along with the [SBPs] to increase the number of small businesses in the defense industrial base.”*

Number of Small Business Prime Contractors Comparison	10.00%
Increase in number of SB primes by 10% or more = 1.3	
Increase in number of SB primes by 5% or more but less than or equal to 10% = 1.2	
Increase in number of SB primes between 0% and less than or equal to 5% = 1.1	
No change in the number of SB primes (Change = 0%) 0% increase; 0% decrease (no change) = 1.0	
Decrease in number of SB primes by more than 0% but less than or equal to -5% = 0.9	
Decrease in number of SB primes by -5% or more but less than or equal to -10% = 0.8	
Decrease in number of SB primes by -10% or more = 0.7	

	2019	2020	2020
	Count	Count	Performance
Small Business	46,873	44,768	0.90
Women Owned Small Business	9,919	9,352	0.80
Small Disadvantaged Business	15,559	15,670	1.10
Service Disabled Veteran Owned Small Business	4,901	4,929	1.10
HUBZone	2,941	3,033	1.10
		Score:	5.00

- Implications:** This may be a useful combined metric for future data dashboards or charts



The SBA FY20 Annual Scorecard: Details of 4 Rating Elements



- **OSDBU Peer Review of DoD on 15 U.S.C. 644(k) (15(k)) Functions (20%) via SBPAC (644a):**
 - SBA allows Sec. 15(k)1 partial credit of 0.5 with explanation and documentation
 - SBA will fully credit Sec. 15(k)14 and 17 if policies and procedures are in place
 - **SBA did not score Sec. 15(k)(21), assistance to SBIR/STTR firms, in FY20 only “to allow the time required to implement necessary policies and procedures”**

15(k) OSDBU Compliance Requirements	18.10%
Requirements Scores: 0.0=No; 0.5 = Partial Credit; 1.0 = Yes	Peer Review Score
15(k)0 Office and Director Experience	0.00
15(k)1 Director Title	1.00
15(k)2 Compensation and Seniority	1.00
15(k)3 Reporting (Head of Agencyor Deputy Head)	1.00
15(k)4 Implementation and Execution of Business Development	1.00
15(k)5 Identify and Address Bundling of Contracts	1.00
15(k)6 Provide Assistance on Payments	1.00
15(k)7 Supervisory Authority	1.00
15(k)8 Assign Small Business Technical Advisors	1.00
15(k)9 OSDBU Cooperation and Consultation	1.00
15(k)10 Recommendations to Contracting Officers	1.00
15(k)11 Activity Conversion	1.00
15(k)12 Advise CAO and SPE	1.00
15(k)13(Optional) SBC and Contracting Specialist Training	1.00
15(k)14 Receive Unsolicited Proposals	1.00
15(k)15 Exclusive Duties and Title	0.00
15(k)16 Congressional Reporting	1.00
15(k)17 Respond to Undue Restriction Notifications	1.00
15(k)18 Purchase Card Summary Data Review	1.00
15(k)19 Vendor Compliance Educational Training	1.00
15(k)20 Subcontracting Plan Review	1.00
15(k)21 Assist Small Business concerns in SBIR or STTR program (This requirement was not included in the FY20 scorecard calcs.)	0.00
Total:	19.00

- **Implications:** OSBPs need to put in place policies and procedures (esp. on SBIR/STTR help)



The SDB Initiative



- **The SDB Initiative** refers to President Biden’s initiative to address racial wealth gap and advance equity by increasing small disadvantaged business (SDB) participation in Federal procurement
 - The SDB Initiative involves legislative and administrative proposals (e.g., to increase SDB goals to 15 percent by FY2025 and SB goals to 25 percent)
- **Remarks by President Biden Commemorating the 100th Anniversary of the Tulsa Race Massacre (02 June 2021):** *“As President, my administration oversees hundreds of billions of dollars in federal contracts for everything from refurbishing decks of aircraft carriers, to installing railings in federal buildings, to professional services. . . I’m determined to use every taxpayer’s dollar that is assigned to me to spend, going to American companies and American workers to American products. And as part of that, I’m going to increase the share of the dollars the federal government spends to small, disadvantaged businesses, including Black and brown small businesses. Right now, it calls for 10 percent; I’m going to move that to 15 percent of every dollar spent . . . I have the authority to do that.”*
- **White House Fact Sheet, Biden-Harris Administration Announces New Actions to Build Black Wealth and Narrow the Racial Wealth Gap (01 June 2021):** highlights proposals to *“use the federal government’s purchasing power to grow federal contracting with small disadvantaged businesses by 50 percent, translating to an additional \$100 billion over five years, and helping more Americans realize their entrepreneurial dreams.”*
 - Reference to 50 percent means current FY20 SDB achievement level (10.54% or \$59B, above the statutory 5% goal)



Executive Orders on Equity (13985 and 14031)



- **Two orders:** (1) EO 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government* (20 January 2021); and (2) EO 14031, *Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders* (28 May 2021).
- **Policy:** “[T]he Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies (agencies) must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.”
- **Definitions:**
 - **Equity** means “the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment,” with the list including ethnic, racial, religious, and sexual minorities, the disabled, rural residents, and “persons otherwise adversely affected by persistent poverty or inequality.”
 - **Underserved communities** “refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life” per equity list



Executive Orders on Equity (13985 and 14031)



- **EO 13985 elements and deliverables:**
 - Charges Domestic Policy Council with coordination
 - Directs OMB, together with agency heads, to study methods on equity assessment and deliver a report to the President
 - **Deadline: NLT 6 months from 20 January 2021 (June 2021)**
 - **Agency equity assessments:** Directs agency heads to select, and conduct equity assessments of, agency programs and policies *“for a review that will assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs.”* Report must be submitted to the Assistant to the President for Domestic Policy. *Note:* Assessment must address resourcing and operational status of offices responsible for serving the underrepresented or disadvantaged communities. **Deadline: NLT 200 days from 20 January 2021**
 - **Agency plans on programmatic and procurement barriers:** Agency heads are required to prepare and submit to APDP and OMB a plan for addressing any barriers to: (i) full and equal participation in equity assessment programs; and (ii) to full and equal participation in agency procurement opportunities. **Deadline: NLT 20 January 2022**
- **EO 14031 elements and deliverables:** Establishes White House Initiative and President’s Advisory Commission on AANHPI, including to “improve the equitable allocation of Federal resources, including through Federal funds, contracts, grants, and awards” to AANHPI. Requires **agency plans** to be submitted to Commission ED **when directed by the ED.**



Executive Orders on Equity (13985 and 14031)



- **EO 13985 implementation initiatives under way:**
 - By July 2021, DoD submitted interim **Equity Assessment**, which selected SBIR/STTR, MPP, ABOR, and Taking the Pentagon to the People (TTPTTP) (HBCU/MI outreach) programs
 - Further study and assessment will be conducted, with additional report
 - **Plans on barriers** (also called SB Supplier Diversity Plans) are to be developed
 - “Agency” not defined – may mean MILDEPs are responsible
 - **Interagency and DoD-Wide Working Groups address** SBA proposed changes to category management tiering credit and conversion issues. SBA’s concern is that local/definitive/regional SB contracts are deemed “unmanaged” (Tier 0) and converted to Best-in-Class (BIC) (Tier 3) GSA MACs. **Current OMB guidance M-19-13**, allows agencies to treat such SB contracts as “managed” within Tier 1, provided the agency reports to OMB a balanced agency strategy on meeting SB goals, using BICs and non-BICs, and exceptions to BICs
 - Some proposals under consideration include: eliminating OMB approval of agency strategies for agency SB contracts; automatic Tier 2 credit to SB socio-economic contracts; regular on-ramping on agency and BIC contracts; goaling for SDBs/SB categories on IDIQs/MACs, etc., etc.
- **Relationship to the SDB Initiative:** Equity plans and working groups are primary non-legislative efforts to implement the SDB Initiative



Executive Order on Competition (14036)



- Order: EO 14036, *Promoting Competition in the American Economy* (09 July 2021)
- **Policy:** *“This order recognizes that a whole-of-government approach is necessary to address over-concentration, monopolization, and unfair competition in the American economy. Such an approach is supported by existing statutory mandates. Agencies can and should further the policies set forth in section 1 of this order by, among other things, adopting pro-competitive regulations and approaches to procurement and spending, and by rescinding regulations that create unnecessary barriers to entry that stifle competition.”* This includes enforcement of antitrust and other competition laws, and cooperation in investigations of unfair competition. *“Agencies can influence the conditions of competition through their exercise of regulatory authority or through the procurement process. See 41 U.S.C. 1705 [the competition advocate statute].”*
- **Elements:**
 - Establishes White House Competition Council (SECDEF included) lead by Director of National Economic Council; requires each agency to appoint a senior official to coordinate agency activities on addressing overconcentration, monopolization, and unfair competition; calls for extensive non-procurement actions
 - Directs agency heads to consider using existing authorities to enhance *“the potential for their procurement or other spending to improve the competitiveness of small businesses and businesses with fair labor practices”*



Executive Order on Competition (14036)



■ Deliverables from DoD:

- Ensure that DoD's assessment of the economic forces and structures shaping the capacity of the national security innovation base pursuant to Sec. 889(a) and (b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283, 134 Stat. 3388) is consistent with the policy of the order
 - **Deadline: 01 March 1, 2022**
- Submit to the Chair of the White House Competition Council, **a review of the state of competition within the defense industrial base**, including areas where a lack of competition may be of concern and any recommendations for improving the solicitation process, consistent with the goal of the Competition in Contracting Act of 1984 (Public Law 98-369, 98 Stat. 1175)
 - **Deadline: NLT 180 days from 09 July 2021 (est. 09 January 2022)**
- Submit to the Chair of the White House Competition Council, a report on a plan for avoiding contract terms in procurement agreements that make it challenging or impossible for the Department of Defense or service members to repair their own equipment, particularly in the field.
 - **Deadline: NLT 180 days from 09 July 2021 (est. 09 January 2022)**
- **Initiatives under way:** SBA is seeking to make category management more open



Executive Orders on Buy American (14005) and Supply Chains (14001 and 14017)



- **Three orders:**
 - EO 14001, A Sustainable Public Health Supply Chain (21 January 2021);
 - EO 14005, Ensuring the Future Is Made in All of America by All of America's Workers (25 January 2021); and
 - EO 14017, *America's Supply Chain* (24 February 2021).
- **EO 14001.**
- **Policy:** secure supplies for pandemic response.
- **Elements/deliverables:**
 - Agencies to conduct immediate inventory of pandemic supply;
 - Agencies to use of Defense Production Act to expand the industrial base and fill shortfalls;
 - HHS to address price gouging. DoD, DHS, and HHS to prepare Pandemic Supply Chain Resiliency Strategy.
 - **Deadline: NLT 180 days from 21 January 2021 (June 2021).**



Executive Orders on Buy American (14005) and Supply Chains (14001 and 14017)



- **EO 14005 (“agencies” defined to include MILDEPs):**
- **Policy:** The United States Government should “consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States” and “whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America’s workers thrive.” “Additionally, to promote an accountable and transparent procurement policy, each agency should vest waiver issuance authority in senior agency leadership, where appropriate and consistent with applicable law.”
- **Elements/deliverables:**
 - Agency heads must review and consider changing their policies to remove policies inconsistent with EO policy and to enforce EO policy
 - OMB must establish the Made in America Office, **which will approve and review requests/plans for waiver from Made in America laws** (means “all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to “Buy America” or “Buy American,” that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods offered in the United States. Made in America Laws include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Public Law 66–261), also known as the Jones Act.”) **Note: SB Act NMR not listed, but fits.**



Executive Orders on Buy American (14005) and Supply Chains (14001 and 14017)



- **EO 14005:**
- **Elements/deliverables:**
 - Agency heads must attempt to account for cost advantages of foreign sources due to improper practices prior to Made in America waivers
 - Agencies must partner with the Hollings Manufacturing Extension Partnership of the Department of Commerce for scouting small business suppliers
 - Agency heads must submit a report to OMB Made in America Director on:
 - (1) implementation of, and compliance with, Made in America Laws;
 - (2) the agency's ongoing use of any longstanding or nationwide waivers of any Made in America Laws, with a written description of the consistency of such waivers with EO policy; and
 - (3) recommendations for how to further effectuate EO policy.
 - **Deadline: NLT 180 days from 25 January 2021 (June 2021)**
 - Thereafter, submit b-annual reports including spend data by country due to waivers of Trade Agreements Act
 - GSA must take actions to establish a public website on Made in America waivers and to recommend actions to ensure that products offered on Federal property (NAFI sales) are U.S.-made IAW this EO.
 - FAR Council must propose FAR change to increase domestic content



Executive Orders on Buy American (14005) and Supply Chains (14001 and 14017)



- **EO14017 (agencies defined to mean MILDEPs):**
 - **Policy:** *“The United States needs resilient, diverse, and secure supply chains to ensure our economic prosperity and national security. Pandemics and other biological threats, cyber-attacks, climate shocks and extreme weather events, terrorist attacks, geopolitical and economic competition, and other conditions can reduce critical manufacturing capacity and the availability and integrity of critical goods, products, and services. Resilient American supply chains will revitalize and rebuild domestic manufacturing capacity, maintain America’s competitive edge in research and development, and create well-paying jobs. They will also support small businesses, promote prosperity, advance the fight against climate change, and encourage economic growth in communities of color and economically distressed areas. More resilient supply chains are secure and diverse—facilitating greater domestic production, a range of supply, built-in redundancies, adequate stockpiles, safe and secure digital networks, and a world-class American manufacturing base and workforce. Moreover, close cooperation on resilient supply chains with allies and partners who share our values will foster collective economic and national security and strengthen the capacity to respond to international disasters and emergencies. Therefore, it is the policy of my Administration to strengthen the resilience of America’s supply chains.”*



Executive Orders on Buy American (14005) and Supply Chains (14001 and 14017)



- **EO14017 (agencies defined to mean MILDEPs):**
- **Elements/deliverables (APNSA and APEP, in coordination with agency head):**
 - **The 100-day Supply Chain Review. Review can be found and read here:**
 - <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>
 - **Review calls for rebuilding of the small business manufacturing base:**
 - ***“SBA should support the diversification of critical suppliers through a targeted effort to better coordinate SBA’s range of investment and technical assistance programs for small businesses and disadvantaged firms in **the four targeted industries [semiconductor manufacturing and advanced packaging; large capacity batteries; critical minerals and materials and pharmaceuticals and active pharmaceutical ingredients (APIs)] and firms seeking to enter those industries. SBA lending and investment products provide vital capital to small businesses, and the Small Business Investment Company program offers long-term equity investment in critical competitiveness sectors. The Small Business Innovation Research and Small Business Technology Transfer competitive programs, will support a diverse portfolio of small businesses to meet research and development needs, and increase commercialization.”*****
 - **APNSA and APEP required to produce additional reports and assessments**



Summary: Implications for Small Business Professionals



- **Use the SBA scorecard model and reporting as your reference**
 - **Take action/ask for help if your organization lacks applicable processes of the type that SBA tracks (or will soon track) or visibility into participation data of the type that the SBA is measuring**
- **Keep your command buyers, leadership, and industry informed on the 4 major initiatives (SDB, equity, competition, and domestic manufacturing)**
 - **Tailor your outreach, market research, and acquisition tools to match the initiatives**
- **Work with SAF/SB and your BOD LOE team to share ideas and share best practices that can advance the 4 major initiatives**
 - **Our small business industrial base needs your help**