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PUBLIC CONTRACTS

Annual Review 2022

January 24 – 27, 2022

DAY 3

12:00 p.m. Claims, Terminations & Disputes

2:00 p.m. Construction Contracting

3:00 p.m. Small Business Contracting

4:00 p.m. Mergers & Acquisitions

WEDNESDAY, JANUARY 26, 2022

12:00 PM to 5:00 PM

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Alan Chvotkin
President, Pub K Group
Partner, Nichols Liu LLP

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- Q&A – to ask a question of the panel, please type your comment in the Q&A box at the bottom of your screen. The panel will address as many questions as time allows.
- Materials
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- Approval is expected but not guaranteed
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CLEs

Important: Many state boards require us to verify participation *during* the event.

Watch for this poll question during the panel:

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We will record your response to verify your participation for the CLE certificate.

SESSION 9

SMALL BUSINESS CONTRACTING

WEDNESDAY, JANUARY 26, 2022

3:00 PM to 3:50 PM

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Presentation Topics

- Increasing small business participation
 - OMB Memo M-22-03
- “New Work” under the 8(a) Program
- Small business regulatory updates
 - ▷ SDVOSB certification
 - ▷ Employee-based size calculation
- Rule of Two cases
- Small business joint venture issues
 - ▷ Profit allocation
 - ▷ Facility clearances
 - ▷ Past performance



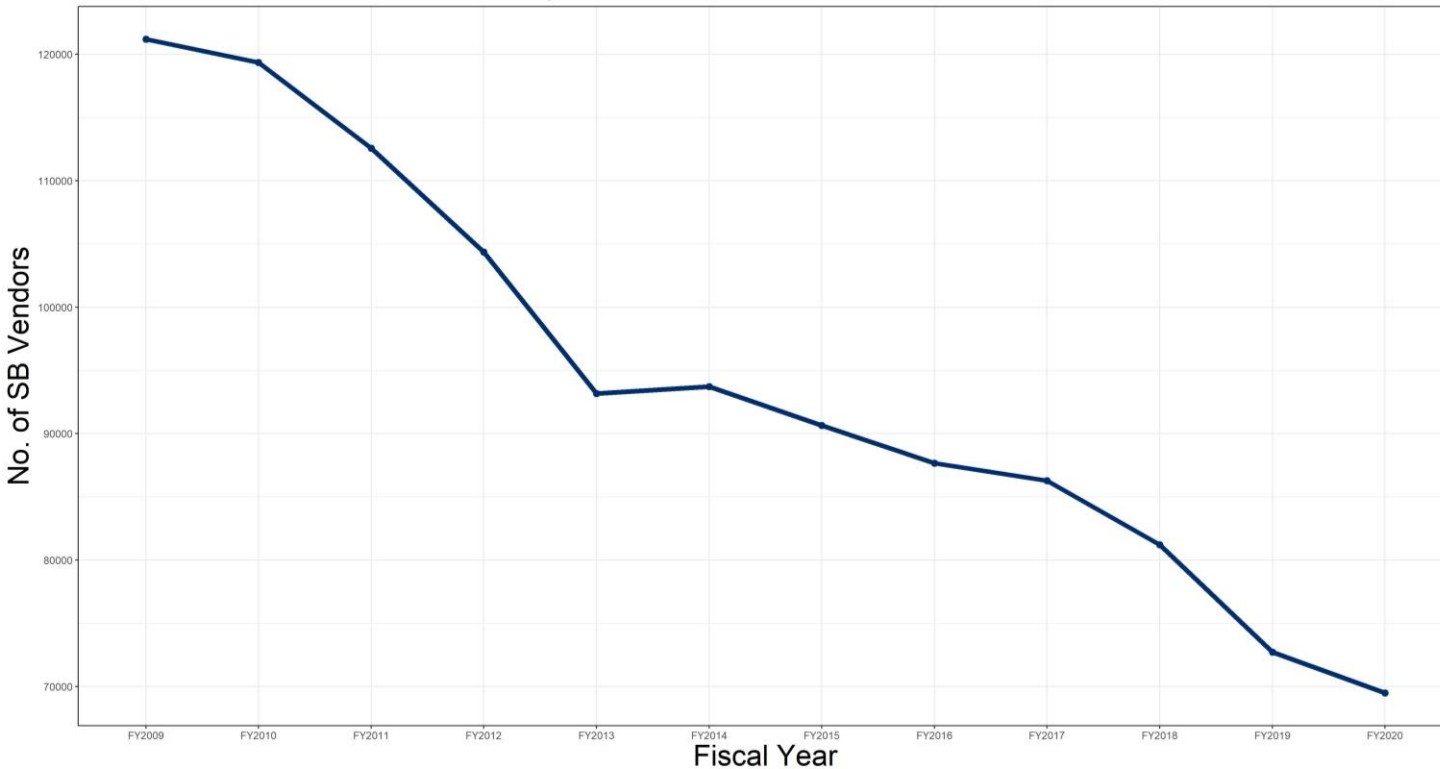
Sam Q. Le, Attorney, Office of General Counsel



Small Business Vendor Count ↓



U.S. Small Business
Administration

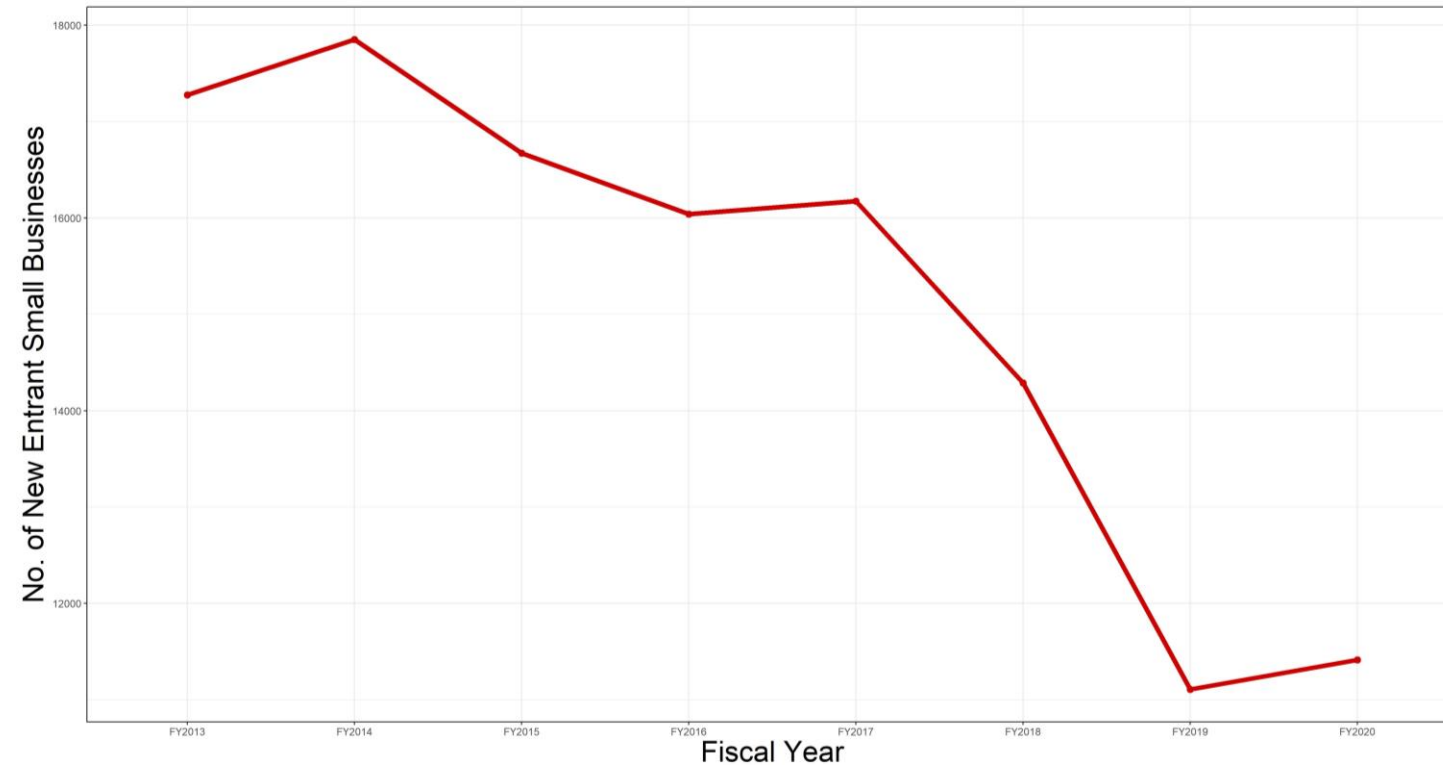


*Count of vendors with at least one positive small-business obligation during fiscal year

New Entrant Small Businesses ↓



U.S. Small Business
Administration



OMB Memorandum: Advancing Equity in Procurement

M-22-03, Dec. 2, 2021 – implementing [Executive Order 13985](#)



U.S. Small Business
Administration

1. Raises governmentwide SDB contracting goal to 11% for FY22, on the way to 15% by 2025.
2. Implements major changes to Category Management.
 - A. automatic Tier 2 credit for socioeconomic small businesses (SDB, WOSB, HUBZone, SDVOSB)
 - B. reinforced importance of goal achievements
 - C. making SBA and Dept. of Commerce voting members on the Category Management Leadership Council.
3. Seeks to increase new entrants and reverse the decline in the small business supplier base.
4. Makes Federal senior managers accountable for small business contracting goals.
5. Ensures OSDBUs have access to senior leadership (report due Jan 10, 2022)

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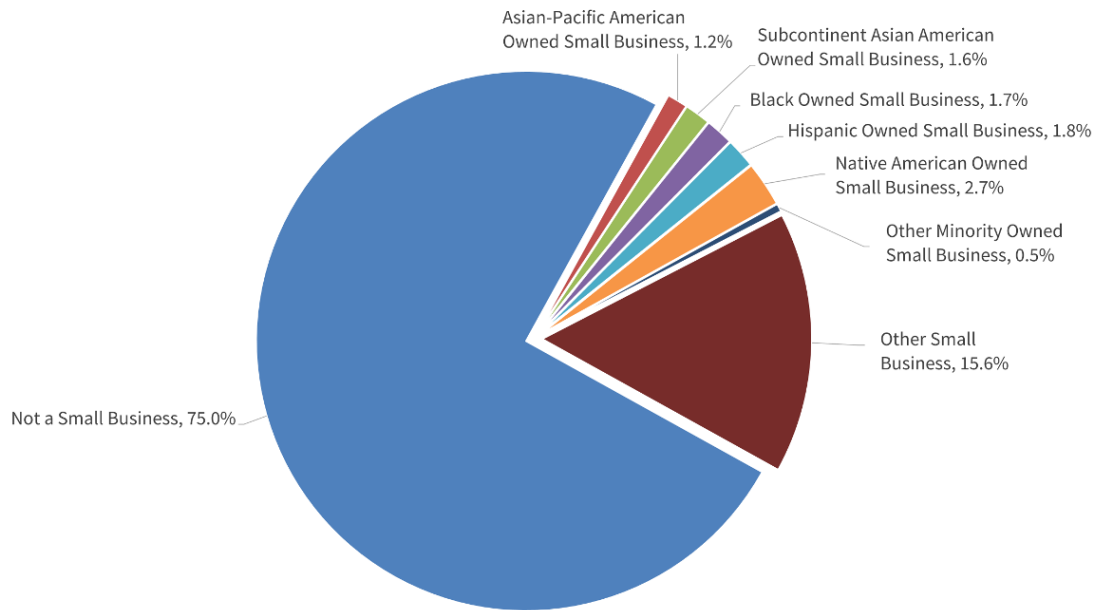
SBA Disaggregated Data Release

[SBA.gov](https://www.sba.gov) – as discussed on [whitehouse.gov](https://www.whitehouse.gov) and [analyzed by CEA](#)



U.S. Small Business
Administration

FY 2020 Federal Contracting¹ by Race² and Business Size



1. Includes only small-business-eligible dollars (\$559 billion in FY 2020). This includes all Federal contracts except those excluded by SBA's Goaling Guidelines. This data does not apply the double-credit and subcontracting adjustments required by statute for SBA's annual scorecard.

2. Racial and ethnic categories are reflected here as they appear in the System for Award Management when an entity registers to do business with the government. Classifications are self-reported. The other small business category reflects those firms who did not report as being minority-owned.

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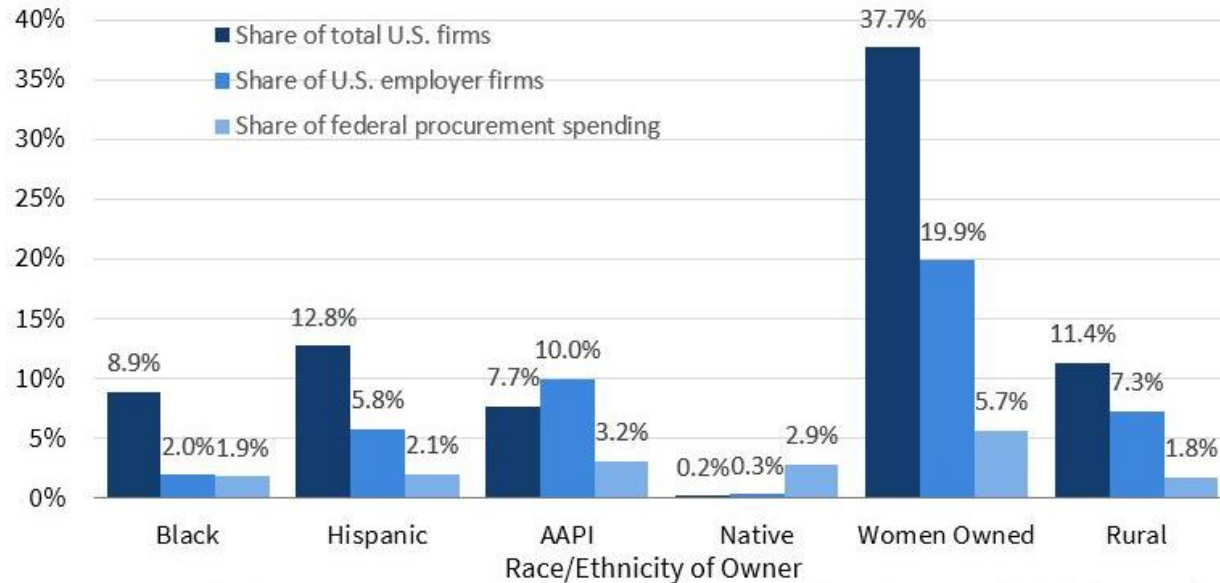
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Demographic Makeup for Federal Procurement

Council of Economic Advisers: [The Benefits of Increased Equity in Federal Contracting](#)



U.S. Small Business
Administration



Source: 2019 Annual Business Survey, 2017 Nonemployer Statistics by Demographics series, CEA Staff Calculations, Small Business Goaling Report via the Federal Procurement Data System - FY 2020.

Note: Procurement data reflect firms self-reporting with the designated categories. Native procurement spending includes firms owned directly by Alaska Native Corporations and Indian Tribes. Black, AAPI, and Native employer firms are restricted to people who identify as non-Hispanic. Total U.S. firms includes employer and nonemployer firms.

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Case Discussion



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■ *Quanterion Sols., Inc. v. United States*, No. 21-493, 2021 WL 5561623 (Fed. Cl. Nov. 18, 2021)

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Policy Update



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- SDVOSB certification moving from VA to SBA (NDAA FY21, Section 862).



Matthew T. Schoonover, Managing Member



Employee-Based Size Standard



■ 2021 NDAA Section 863

- Increased calculation period for employee-based size standards to 24 months

■ 86 Fed. Reg. 60396 (Nov. 2, 2021)

- Proposed rule to implement change
- Also proposed to allow 5-year annual receipts calculation period for business loan, disaster loan, and SBIC program
- Comments closed December 2, 2021

Rule of Two Cases

- *The Tolliver Group, Inc. v. United States*, 151 Fed. Cl. 70 (2020)
 - Army canceled SDVOSB set-aside issued under FSS (FAR 8.4), seeking to procure instead under multiple-award IDIQ vehicle
 - Protest alleged violation of Rule of Two (FAR 19.502-2(b))
 - FASA jurisdictional bar did not prevent protest
 - Army's decision violated FAR 19.502-2(b)
 - Applies to "any acquisition"
 - Agency must apply Rule of Two analysis before cancelling and deciding to issue contract under multiple-award IDIQ

Rule of Two Cases

■ *ITility, LLC*, B-419167, 2020 Comp. Gen. 412 (Dec. 23, 2020)

- 2018: ITility awarded SDVOSB task order under PACTS contract, for program and technical support services
- 2020: DHS decided additional labor categories needed
 - Released contract under Alliant 2, after considering OASIS, VETS II, and 8(a) STARS II
 - Awarded unrestricted task order to Enterprise Information Services, LLC for approx. \$60m

Rule of Two Cases

- *ITility, LLC*, B-419167, 2020 Comp. Gen. 412 (Dec. 23, 2020)
 - Protest alleged violation of Rule of Two (FAR 19.502-2(b))
 - Though FAR applies to “any acquisition,” Congress amended Small Business Act in 2010 to allow agencies to set aside orders at their discretion.
 - FAR similarly amended in 2011
 - Distinction between mandatory set-aside obligations when establishing a contract, and discretion when setting-aside task order under an IDIQ contract
 - GAO disagreed with *Tolliver* decision, noting it does not matter whether protester is “inside” or “outside” the IDIQ

Joint Venture Profit Allocation

- *Swift & Staley, Inc. v. United States*, 155 Fed. Cl. 630 (2021)

- SSI bid on small business set-aside, with \$41.5m standard

- SSI is a *minority* owner of *populated* JV, called Portsmouth Mission Alliance, LLC

- SBA size determination included SSI's proportionate share of PMA revenue, and determined SSI was ineligible large business

- OHA affirmed

Joint Venture Profit Allocation

- *Swift & Staley, Inc. v. United States*, 155 Fed. Cl. 630 (2021)
 - COFC: because JV was populated, it did not meet the SBA regulatory definition of a joint venture. 13 C.F.R. § 121.103(h)
 - Subparagraph (h)(5) thus does not apply
 - “[A]ny use of the term ‘joint venture’ within Paragraph (h) and its subparagraphs must refer *only* to a joint venture that meets the specific definition and requirements of Paragraph (h). . . . Consequently, a partner to a populated joint venture is not required to ‘include in its receipts its proportionate share of joint venture receipts’ under Subparagraph (h)(5).”

Joint Venture Profit Allocation

- SBA pushes back on *Swift & Staley*
- 87 Fed. Reg. 380 (Jan. 5, 2022)
 - ▶ “[A] joint venture partner of any kind must include its proportionate share of joint venture receipts and employees in its own receipts and employee count to ensure that all its revenues and employees are properly considered in determining that partner’s size.”
 - ▶ Updates 121.103(h) to specifically note that joint venture receipts/employees must be counted in proportionate share regardless of populated status
 - ▶ Effective immediately



Shane J. McCall, Equity Partner



JV Facility Clearance



- GAO confirms that an unpopulated JV need not possess a separate Facility Security Clearance if both members have an FCL
- InfoPoint LLC, B-419856 (Aug. 27, 2021)
- 2020 NDAA; SBA Rule at 13 C.F.R. § 121.103(h)(4)

JV Experience



- GAO: Agency can't require protege member of a mentor-protege joint venture to have same level of experience as other offerors
- Innovate Now, B-419546 (April 26, 2021)
- Agency can't require protégé to "individually meet the same evaluation or responsibility criteria" as other offerors, 13 C.F.R. § 125.8(e)

Small Business Past Performance



- SBA proposed Rule
 - Agencies must consider past performance of JV when evaluating proposal of a small business member of a JV
 - Small business subcontractors would be able to obtain past performance ratings from large primes and use those ratings when bidding as a prime

THANK YOU!

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Small Business Administration

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Questions or Comments?
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