

# *NATIONAL DEFENSE INDUSTRIAL ASSOCIATION*

*9<sup>TH</sup> National Small Business  
Conference*

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Rosemont, Illinois*



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## *Capitalizing on the Rule of Two and Other Set-Aside Business Strategies*

*Presented  
by  
Bill Hughes*

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- *Small Business Set-Asides*

- *Purpose*

- *Promote objectives of the Small Business Act*
    - *Recognize importance of small business*

- *Exception to “full and open” competition*



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- *Small Business Set-Asides (con't.)*
  - *Eligibility*
  - *Small business concern*
    - *Includes Affiliates*
    - *Not dominant*
    - *Meets size standards*
  - *NAICS codes*
  - *Self-certification*
  - *Recertification*



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- *Set-Aside Programs/Opportunities (\$100B)*
  - *Small business (23%)*
  - *Veteran-owned small business*
  - *Service-disabled veteran-owned small business (3%)*
  - *HUBZone small (3%)*
  - *Small disadvantaged (5%)*
  - *Women-owned small (5%)*



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- *Set-Aside Program Frustrations*
  - *Agency failure to meet goals*
  - *Agency refusal to acknowledge small business capabilities*
  - *Agency preferences for large business incumbents*
  - *Award of small business set-asides to large businesses*
  - *Award of SDVO set-asides to non-SDVO entities*



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- *Set-Asides for Small Business – FAR Subpart 19.5*
  - *Process for the set-aside decision*
  - *Contracting Officer’s role/duties*
    - *CO “shall review acquisitions to determine if they can be set aside”*
    - *CO “shall perform market research.”*
    - *CO “shall . . . document why a small business set-aside is not appropriate”*



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- *Set-Asides for Small Business – FAR Subpart 19.4*
  - *The SBA's Role/Duties*
    - *Review proposed acquisitions – recommend set asides, new small business sources or breakout of components*
    - *Review proposed acquisition packages – recommend contracting methods to increase small business prime contract opportunities*



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- *Requirements for Set-Asides*
  - *CO “shall set aside” acquisitions in certain cases*
    - *When in the interest of national defense*
    - *To ensure fair proportion of contracts is with small business*
  - *Exclusions*
    - *Purchases below certain thresholds*
    - *Purchases from required sources of supply*
    - *FSS contracts*



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- *Requirements for Set-Asides (con't.)*
  - *The Rule of Two – Total Set-Aside is mandatory if:*
    - *Acquisition is over \$150,000*
    - *Reasonable expectation of offers from at least two responsible small businesses (offering the products of small businesses)*
    - *Award will be made at fair market prices*



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- *Total versus Partial Set-Asides*
  - *Rule of Two applies to total set-asides*
  - *Partial set-asides shall be made when:*
    - *Total set-aside is not appropriate*
    - *The procurement is severable*
    - *“One or more” small businesses have the technical competence to perform at fair market price*
    - *Simplified acquisition procedures are not involved*



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- *Partial Set-Aside Award Process*
  - *Awards made on non-set-aside portion first*
  - *CO negotiates with eligible concerns on the set-aside portion*
  - *Must submit offers on both portions*
  - *Eligibility for both portions can't be basis for reduction in price*



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- *Insufficient Reasons for Not Setting Aside*
  - *Small businesses received previous contracts*
  - *The item is covered by the Industrial Readiness Planning Program or QPL*
  - *Offers are needed in less than 30 days*
  - *Acquisition is classified*
  - *Agency is meeting its small business contract percentage*
  - *“Brand name or equal” item is required*



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- *Small business strategies*
  - *Active monitoring of acquisitions*
    - *Early involvement in the process*
  - *Aggressive identification of set-aside opportunities*
  - *Awareness of other likely small business offerors*
  - *Alertness to competitors' affiliation issues*



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- *Small business strategies (con't.)*
  - *Advocacy with COs and SBA representatives*
  - *Congressional inquiries*
  - *NAICS code challenges*
  - *Push for partial set-asides*
    - *“one or more” small business with capability*



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- *Small business strategies (con't.)*
  - *Size challenges*
  - *Status challenges*
  - *Responsibility determination challenges*
  - *GAO protests*
    - *Failure of agency to set aside*
    - *GAO will not hear protests regarding affirmative determinations of responsibility, SBA issues.*





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- *SBA's Affiliation Rules*
  - *Ownership, management, previous relationships*
  - *Stock ownership*
  - *Identity of interests*
  - *Newly organized concern*
  - *Joint ventures*
  - *Ostensible subcontractor*



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## *QUESTIONS*



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*Bill Hughes is a partner of the law firm of Whyte Hirschboeck Dudek, and chairs the Firm's Government Contract practice. Bill has extensive experience in the award, protest, and litigation of competitively bid and publicly awarded contracts. He counsels clients on all aspects of government contracts including audits, bids, contract negotiations and awards, set asides, changes, claims, intellectual property rights, terminations and disputes. He has extensive experience representing small businesses, woman-owned businesses and service-disabled veteran-owned small business concerns on government contract matters. He also represents clients on protests before the Government Accountability Office, contract disputes before the various boards of contract appeals and the U.S. Court of Federal Claims, and size status protests before the SBA Office of Hearings and Appeals.*

*Prior to joining WHD, Bill was an attorney for the U.S. Air Force at the Air Force Contract Law Center where he served as senior legal counsel for a number of major procurement programs. He is a graduate of the United States Air Force Academy and Marquette University Law School (Magna Cum Laude). He also has a Masters of Law in Government Procurement from George Washington University (with highest honors). He is the founder and Past President of Wisconsin Chapter of the National Contract Management Association. He serves as a member of the Board of Directors and as General Counsel for the Wisconsin Procurement Institute and as a member of the Board of Directors of the Great Lakes Chapter of the National Defense Industrial Association.*



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