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[START OF TRANSCRIPT]

Carla: Ladies and gentlemen, welcome and thank you for joining today's live SBA web conference. Please note that all participant lines will be muted for the duration of this event. You are welcome to submit written questions during the presentation and these will be addressed during Q&A. To submit a written question please use the chat panel on the right-hand side of your screen. Choose All Panelists from the sent to drop down menu. If you require technical assistance, send a private note to the event producer. I would now like to formally begin today's conference and introduce Chris Eischen Chris, please go ahead.

Chris: Thank you, Carla. Hello everyone, and welcome to the first session of SBA's first Wednesday webinar series for fiscal year 2019. Before we start with our program, we want to make sure you are aware that today at approximately 218 eastern time, you can expect to receive a presidential alert that will pop up on your cell phone. Ironically, this time coincide with our call today. The test was supposed to take place on September 20th, but apparently, the president wanted to coordinate with our SBA first Wednesday session. The alert is part of famous system to warn citizens in case of a natural emergency. Please note that this is only a test, and no action is required, so you can remain calm and fully engaged in the training we have arranged for you today.

Onto slide two. For today's session, we will be focusing on the non-manufacturer rule, and by the end of the program, you should have a better understanding of this topic as well as the resources available to you. If you are new to our event, this is a webinar series that focuses on getting subject matter experts on specific small business programs. In this case the non-manufacturer rule, and having them provide you with valuable information you can use, and the performance of your job as an SBA employee, a member of the Federal Acquisition community, or a PTAC employee. We appreciate you taking the time to join us for our first session of the FYI 19 program, and we hope you benefit from today's session.

Now, for a little background on the first Wednesday program. The program was initially created for contracting staff which is why the training was called 1102 first Wednesday. 1102 designated government series for federal agencies increase the requirements for non 1102's to obtain diarrhea and vaccine certifications. Additionally, other federal bonding activities SBA staff, PTAC, and SBDC personnel, who after hearing about the training requested access, and were added to the list of participants. So, that is why SBA first Wednesday program is aimed at federal government employees, and resource partners like PTAC and SBDCs. Thank you to those of you who are repeat attendees, and welcome to those of you who are new to the program.

Slide three. As Carla mentioned, I'm Chris Eischen and I work as a Procurement Center Representative, or better known as PCR, and I'm located in the Kansas City, Missouri. Additionally, Ms. Gwen Davis who was PCR located in Minneapolis Minnesota will be reading your questions submitted during the program for our speaker to address at the end of today's session. We both work in Government Contracting Area IV, and slide three includes our information.

On slide four, please note that all lines or on mute. However, you may submit questions anytime during today's session by entering them into the chat box on your screen. These questions will be expressed at the end of our speaker's presentation. As most of you know, we have transitioned to the WebEx application, and have been informed that some users still may experience issues, such as a blocked website, or other error messages when attempting to access the conference login from their computers. If you're affected by this issue, please make sure you dial in and follow along with the slides provided in this email. We will ensure that page numbers are clearly stated, so you can follow along. We're hopeful this issue will be resolved soon and we apologize for any inconvenience.

Now, if you're having any other technical problems, please call the AT&T support desk at the following number 1-888-796-6118. This telephone number is also included in the email invitation for today's program and on slide four of the PowerPoint presentation. Otherwise, just keep listening and follow along with the PowerPoint presentation that accompanies the invitation for today's session. As I mentioned earlier, we will continually announce the page numbers so you can follow along. For more SBA, Small Business Program training, please visit the SBA learning center@www.sba.gov

Onto slide five. The Association of Procurement Technical Assistance Centers, or APTAC, hosts a website where they post the first Wednesday programs. Since these sessions are recorded, you can relist into this program as well as previous sessions have been in the website which is provided here on slide five. You can also view the written transcripts of today's session there as well.

So, Procurement Technical Assistance Centers or PTAC are a great resource and partnering with your local PTAC for an industry day, **[00:05:30 inaudible]**, and our fine notices, or referring small business concerns to a PTAC are just a few reasons why they are such a useful resource for acquisition personnel. Please contact your local PTAC for additional information.

Now slide six is our calendar of training sessions looks pretty bare right now, but it's a schedule for fiscal year 2019, and today's session on understanding the non-manufacturer rule is the first topic in the series. As you'll see there are several topics that need to be filled and we're working diligently to get you the best possible training experience. We plan to cover a couple of new topics as well as provide new guidance on other areas that have been presented in the past, so you won't want to miss it. We plan to have a complete schedule established by our next session, which is on November 7.

I'm sure many of you will want to receive credit for today's training. So, on slide seven, you'll be happy to know that today's session is worth one CLP. On the following slide which is slide eight, you will find the training certificate. First, you will manually fill in your name, and then print the certificate from the PowerPoint to request credit for today's session. The PowerPoint presentation was part of the SBA email invitation that you receive for today's session. SBA does not track your CLPs, or communicating your training program regarding your CLP achievements.

Now, several of you may have received the information for this training from a friend or colleague, but if you want to receive an email directly from us notifying you of upcoming first Wednesday webinar events, just send us an email at SBA learning, sbalearning@sba.gov In the subject lines, please enter the words add to list and will ensure that you're added to the distribution list.

I was just mentioning slide eight is the actual certificate that you'll print out. First, you will need to access the PowerPoint presentation that was emailed to you. Then you will manually fill in your name where it states, insert your name here. Next, within the print sentence, you could select Print current slide which will allow for only the certificate to be printed. Another reminder, please note that SBA does not track your CLP or communicate with your training program regarding your CLP achievements.

Now, onto slide nine. Today's training has been assembled to address the non-manufacturer rule, as well as provide you with the resources available for your use. Our speakers have graciously accepted our invitation, and they will be directing me to continue on to the next slide. As mentioned earlier, if you are unable to access to WebEx application, please follow along with the PowerPoint presentation that was provided in the email for today's training. We will identify the page number so you can follow along. Also please note that due to connectivity issues, some viewers may experience a delay as a slide changes on your screen.

Now, I am pleased to introduce today's speakers to you Mr. Sam Lee, who is an attorney advisor for SBA's office of general counsel, and Miss Carol **[00:08:46 inaudible]** who is a program analyst for SBA’s non-manufacturer rule. Carol and Sam, we appreciate that you can meet with us today and I'll turn the program over to you now.

Sam: Appreciate it very much, Chris. Thanks very much for introducing us and thanks everybody on the call for attending today. This is an important, but sometimes complex issue, and we are very happy to be able to share our knowledge of the non-manufacturer rule with you. It's important component of SBA small business programs in our set aside program. To introduce myself again, Sam Lee with SBA Office of General Counsel, on that SBA headquarters in Washington DC. With me here, at the SBA headquarters is Carol **[00:08:46 inaudible]** She's with the office of government contracting, and worked on non-manufacturer role issues, including waivers of the non-manufacturer rules.

Next slide. Slide 10. Today we'll be going over the non-manufacturer rule in general, and then how the non-manufacturer rule applies to FDA programs including, Small Business set aside under FAR Code 19, then Carol will explain how contracting officers can request individual waivers from non-manufacturer rule, and SBA goes about processing these waivers. There are also special rules or certain types of procurement like multi-item procurement that we'll go over in that section as well. Then after the individual waiver section will discuss class waivers to the non-manufacturer rule, where the waivers can refer to particular **[00:10:27 inaudible]**

Slide 11. So, first of all, jump into the non-manufacturer rule, what it is generally, and where it applies like.

Slide 12. The purpose and definition of the non-manufacturer rule is, there are five. The non-manufacturer rule allows and otherwise, responsible business concerns to be awarded a procurement contract to supply a product even though it is not the manufacturer or processor of the product, as long as it meets certain conditions. Those of you who are familiar with SBA's, small business set aside program, you probably have heard of the limitations on subcontracting. The limitation of subcontracting sometimes called the 50% rule applies to the five end services. The non-manufacturer rule is an exception to the limitations on subcontractor. So, where that purpose statement says, "That the firm can be awarded a procurement contract supply a product even though it is not the manufacturer of the product". That means the non-manufacturer allows the firm to receive the certified award, even though it will not satisfy the limitation on subcontracting. So, that's an explanation for those of you familiar with that rule, if you're not familiar with that rule, then keep with the purposes stated in the slide.

Slide 13, please. The last slide mentioned conditions that apply the non-manufacturer rule. The conditions are listed on this slide. There are four conditions to qualify as a small non-manufacturer. A firm must first not exceed 500 employees. Second, it must be primarily engaged in retail or wholesale trade and normally sell the type of product that is being supplied. Third, the firm must take ownership or possession of the item in a manner consistent with industry practice, and four, the firm must supply the end product of a small business made in the United States, or there must be a waiver to the non-manufacturer rule.

To clarify that, that last bullet is in awe with the fourth element, not in awe to all four elements together. So, for example, if a firm had 700 employees, so it doesn't meet the first element, but it obtains, there's a waiver to the non-manufacturer rule, that firm would not qualify, that waiver is in awe, it's only an alternative for that for that fourth element. One more point that is kind of advanced point on this slide that I want to make is in the second element, where it requires that the firm be primarily engaged in retail or wholesale trade, and normally sell the type of product being supplied. That wording of using type of product is significant there.

We had previous cases where the firm didn't sell the exact product being supplied, but it's sold other products within that category. That is acceptable under this rule because the regulation requires that the firm sells the type of product, not necessarily the specific product that's being supplied on the contract. This is looking retrospectively. So, if a firm had been selling some other product within the same category previously, then it could qualify under that second element for selling the particular product that issue in the contract.

Moving on to slide 14. The SBA has a definition of manufacturer, and that's important for two reasons. The first reason which is not an issue in this slide. The first reason is for the limitations on subcontracting, that's 50% rule that applies to services and supply contracts. If it's a supply contract, the definition of manufacturer is important because that determines whether the firm, all five as the manufacturer on limitation of subcontracting. On limitations to subcontracting services to perform at least 50% of the manufacturing function for that contract. For our purposes, here the definition of manufacturer is important because it determines whether the firm has met all the elements of the non-manufacturer, including that fourth element that the product be manufactured by a small business in the United States, or that the firm receive a waiver.

The definition of manufacturer is that fourth in SBA rules, you can see the citation at the bottom of the slide. The manufacturer is the concern which performs the primary activities and transforming organic or inorganic substances, including the assembly parts and components into the end item that is being acquired. The definition goes on to state that firms which only perform minimal operations on the end item, or firms which add substances, parts, or components to the end item, do not qualify as a manufacturer of the item being acquired. So, as an example is, if the firm is say taking a container, a box, or something and just painting that box, or doing something to that box. That is really not part of the functionality. That box well, we might call it a minimal operation that would not qualify as a manufacturer. However, that determination is contract specific, and it may change from item to item. So, it's somewhat difficult to generalize on whether a firm would qualify as a manufacturer without meaning in particular what the product is.

Okay, going on to slide 15. We're going to talk about where the non-manufacturer rule applies.

So, go on to slide 16. The non-manufacturer rule applies based on the type of small business program that the agency is using, and the dollar value, the estimated dollar value of the acquisition. So, for small business set aside, the non-manufacturer rule applies above the simplified acquisition threshold. For set-asides under the 8(a), service-disabled vet, women-owned, or HUBZones programs, the set aside applies, non-manufacturer rule applies to both the micro-purchase special. It's called the alert comes here.

The non-manufacturer role only applies against a manufacturing or supply contract, so it does not apply to service contracts, or to construction contracts, and the non-manufacturer rule applied depending on that the dollar threshold. I want to note that the dollar threshold that are reflected in this slide, on the dollar threshold from SBA regulations that 13 CFR 121406 at the bottom.

There are different dollar thresholds in the FAR, and in the FAR clauses. I understand that FAR is working on harmonizing the FAR regulations, the SBA rules. SBA rules are more current in keeping with the Statute, and with keeping with regulatory changes, so our slide today reflects the SBA regulations. The FAR regulations if you were to look at FAR 19, have particular specific dollar threshold, not just simplified acquisition threshold, micro-purchase special as we have on the slide, the FAR has a particular dollar amount. SBA recently changed our regulations to just like the simplified acquisition threshold and micro-purchase threshold into the reg. So, agencies at this point have potentially varying supply acquisition thresholds potentially varying micro-purchase threshold depending on the agency, and depending on the type of procurement, so we decided SBA just to use the term rather than setting for a specific dollar threshold.

Going on to slide 17. More on the dollar threshold here. The non-manufacturer applies above the micro-purchase threshold for set-aside award under the social economic programs, that the 8(a), HUBZone, women-owned, and service-disabled vet contracts, all which are conducted under FAR part 19. The non-manufacturer rule applies to small business set aside award, which are small businesses set outside of the social-economic program, you know what you might just call them a total small business set aside rather than, 8(a), service-disabled vet, as the non-manufacturer rule applies to small business set aside award above the simplified acquisitions threshold.

As you probably know, the simplified acquisitions thresholds in the FAR is $150,000 was recently raised by Statute to $250,000, and many agencies have deviated from the FAR to implement that statutory change, but you would want to check with your agency, in particular, to see if your agency is deviated, so **[00:20:45 inaudible]** $250,000. Under SBA rules, the outcome of the two different thresholds is that the non-manufacturer rule does not apply to small business set-aside, between the micro-purchase threshold and the simplified acquisitions threshold, but it would apply to social economic set-aside if the estimated contract values between the threshold.

The non-manufacturer rule does not apply to small business subcontracts. For example, a subcontract from a large prime to a small business up, and also does not apply to full an open contract.

Onto slide 18. One of the point that we made earlier, the non-manufacturer rule only applies to supply contract. I mean, it doesn't apply to service contracts or construction contracts. That's the general rule that SBA provides more specificity as to how to decide whether a contract is subjected on the non-manufacturer rule. The non-manufacturer rule only applies to those acquisitions within the NAICS codes that are designated as manufacturing and supply acquisitions. Those are three series NAICS codes 31 and through 33 and NAICS code chart.

SBA is also issued by regulation guidance that the non-manufacturer rule applies to software, but not to subscription or remote software. Some people might refer to it as cloud software. We consider subscription software to be a service, but if you are purchasing software outside of a subscription or remote, you know perhaps CD, or on perpetual downloadable license, we consider that to be a supply, and we would apply to non-manufacturer rule to that acquisition of the supply.

Then also there is a NAICS code that is within the service categories, that's 541519 exceptions of the footnote 18, that is designated for information technologies, value-added resellers or **[00:23:10 inaudible]** bars. That NAICS code exception is an exception for supply contracts, so we apply the non-manufacturer rule to that exception as well. The way that you can tell that you're using the exception is, the exception that footnote 18 has a different size standard than the other general 541519 contracts.

If you're using the exception for it FAR that has a 150 employees size standard, whereas if you were going to use just the regular 541519 you would be using $27.5 million repeat size standard. To make it simple to apply, if you're using that 150 employees size standard under 541519, the non-manufacturer rule apply. Now, a further point of clarification, we previously said that the non-manufacturer rule will require, that the firm have 500 employees or less. Well, if **[00:24:25 inaudible]** has a 150 employees size standard, so we would apply that 150 employees size standard, rather than the 500 employee size standard. Slide 19, please.

Carol: I'm going to talk about individual waivers. I actually process the waivers that come into the office, and so I'm going to go over what needs to be submitted in order to obtain a waiver. So, individual waivers apply only to the specific solicitation, So, it's a one-time waiver, and it applies to this specific item identified in the waiver request. What you have to show is that no small business manufacturer or processor can reasonably be expected to supply the product meeting the specifications of the solicitation. The request must come from the contracting officer, and it has to include eight elements that you'll see on the following page. Right now, I'm on page 21. An additional guidance as to how to submit this waivers, and about the process can be found in the **[00:26:05 inaudible]** 607.

Going on to page 22. We're listing the eight elements that have to be provided in a request for waiver. The first one obviously has to be signed and signed by contracting officer. The proposed solicitation number or other ID should be included, the estimated dollar amount of the contract as well as the NAICS code of the solicitation. A brief statement of the procurement history of the item. and for contracts over 500,000, you have to provide a statement of work or the equivalent. You also have to provide a definitive statement as the item or items to be waived, as well as a justification as to why they're required. In addition, a narrative describing market research, and supporting documentation must be provided.

The detailed statement of the items, I am on page 23. So, as they need the items sought under the solicitation to be described in terms of their qualities and attributes. So, you can do this using layman terms or technical terminology. However, if the primary reason for narrowing sources is to paint a brand name item, SBA generally will not issue waiver, unless the contracting officer provides a limited resources certification showing a legitimate need with a brand name item. So, really you need to explain why the item is essential.

Going on to page 24. Page 25. So, at the eight elements mentioned, market research which was mentioned last is actually the most important. SBA needs to see a narrative, a statement that provides reasonable certainty that there are no small business manufacturers that make and could supply the item sought. The contracting officer have to perform extensive market research and provide a clear description of that market research. Examples of the tools that are commonly used to issuing those result notices and that should include language, or put on alert small businesses that this is a solicitation that they could be interested in. They also look at the SBA's, term searches. They conduct industry days and roundtable discussions, direct correspondence with small businesses, **[00:29:47 inaudible]** or past procurement may be helpful. If it's repetitive acquisition and based solicitation and recent market research showing this no change in the marketplace, that would be good to show that you've collected adequate market research.

Page 27. In most cases, the sources or notice is the most effective market research tool, as it reaches a broader community. SBA requires that sources or notice include language, specifically seeking small business manufacturing and defined items in terms of saying characteristics. In addition, SBA prefers that these notices be posted for at least 14 calendar days. Notice of the waivers. Potential offers must be notified of class or individual waivers at the time of solicitation. However, this can be done after the solicitation if potential offers are boarded additional time to respond.

Onto slide 29, which is multiple item procurement.

Sam: I'll take over here, but before I get into multiple item procurement, I want to highlight the chat statement that producer made. We made some updates to the slide deck after it was sent out to everybody, particularly with the threshold, and if you want to get an updated slide deck that includes that newly updated threshold five, please email sbalearning@sba.org.

We're going to talk about multi-item procurement, and before we do that, if you want to take a step back, and clarify that the reason for these waivers is that the agency does not have, or cannot find a small business producer. If you recall, the non-manufacturer rule has four items, four requirements, and the fourth requirement is that the non-manufacturer rule provide the product of a small businesses made in the United States. If there are no small businesses that manufacturer the item, then the agency can pick the waiver, and that's the reason that we require this market research for showing that there is not a small business manufacturer for that particular product.

In 5.9, there is a summary there of how SBA handles multi-item procurement. This is a fairly recent innovation for SBA regulations. Previously, it was thought that if you have three items, for example on your contract A, B, C, and a firm wanted to qualify for non-manufacture rule, it would have to qualify for each of those items. They would have to provide the product of a small business, and meet the United States four items A, B, and C. Well, we have now recognized in the non-manufacturer rule, that the non-manufacturer rule will operate on an item by item basis, and a waiver is not necessary for every item that manufactured by a large business in a multi-item procurement.

The second point there is important as well. is the agency, the contracting agency, the **[00:33:50 inaudible]** issue a solicitation that has a non-manufacturer rule waiver, the agency should identify in the solicitation what items are covered by that waiver. As I explained, the multi-item procurement rule more you will see why that's the case.

Slide 30, please. Here's the new rule. The rule is at least 50% of the total estimated contract value must be manufactured by small business, or receive a waiver. So, for example, in that scenario with A, B, and C, but they're all the same dollar amounts and agents. A small business to qualify as the non-manufacturer, even if it provides C from a small business, if it provides A and B from small business manufacturers located--, manufactured in the United States, though we've taken the non-manufacturer rule from a 100% rule now to a 50% rule for multi-item procurement.

If a business could qualify, if it provides over 50% of the contract value by large business, as long as some of those products are covered by waivers. So, the idea there is you can kind of mix and match small business manufacturing with waivers. So, let's say A, B, and C, again if you have A, from a small business, and you get B covered by a waiver, then the waiver means a large business could provide that products, could you now waive the non-manufacturer rule, and C could still be provided by a large business without a waiver, could be now satisfy that 50% rule.

If you have a multi-item procurement that involves a firm that is a manufacturer, and it also is providing products as a non-manufacturer, we apply the FAR standard of the manufacturer. If you look at our -- to clarify that people can size standard table, the manufacturing size standards are generally listed by employee numbers, and some of those employee numbers are different from 500. They might be 750, or 1000, or 1500. So, if you have a firm that both the non- manufacturer and the non-manufacturer you would use the size standard that's listed on the table which might not be 500 employees, whereas if a firm is just a non-manufacturing subject to that 500 employees size standard, that is the first element of a non-manufacture rule.

Slide 31, please. Here's some examples we can walk through for multi-item procurement. First, we have a contract that has a total value of $1 million, and the small business is going to provide $500,000 of supply manufactured by small business. Here, the small business complies with the non-manufacturer rule, because 50% of the total contract value is being manufactured by a small business, and there's no waiver required because that's nonmanufacturer is compliant with the small business non-manufacturer rule without even needing a waiver.

Example two, again, you have a contract with the total value of a million dollars, 200,000 of that is manufactured by small business, and the contracting officer obtains non-manufacturer waiver for 200,000 of the remaining value. Though here, 200,000 manufactured by a small business, that must mean that 800,000 is being manufactured by others in small business, or perhaps being manufactured outside United States.

In that case, in example two, the firm that is seeking the contract did not comply with the non-manufacturer rule, because of the 800,000 that's not covered by the non-manufacturer, only 25% is manufactured by small business. Essentially, you have to get over that 50% threshold here, they've only gotten to 40%, 400,000.

Example three. Total contract value. again, $1 million. 300,000 is manufactured by small business, the contracting officer obtains non-manufacturer waivers for 400,000 of the remaining value, and this comprises non-manufacturer rule of the $600,000 not covered by a non-manufacturer rule waiver, 50% is manufactured by small business.

Going on to slide 32. We're going to talk about class waivers to non-manufacturer rule.

Slide 33, please. A class waiver is a different category of waiver. We've talked about an individual waiver in the contract specific waiver. A class waiver is justified, where there's no small business manufacturers that are first available to participate, then second are in the federal market, and third are manufacturing that class of products.

Next slide please, slide 34. The class product, we again, look back to the next table, and we refer to a subdivision within the next table for class waiver will have a NAICS code associated with the code. We generally list the class waivers using a combination of the NAICS code and the PFC, and also identify the class of products though when you see the class waiver table, it'll have the six digits unique, the four-digit PSC, and then a description of the product at the same way, so it might be rubber tires or something to that effect that has been the NAICS, it will have PSC, and then a short description of product.

Next slide please, slide 35. Be available to participate factor or element. In fact, the small business contractors have performed, been awarded, or submitted an offer on a federal government contract for that class of products within the last 24 months, and that means any small business. So, if you have just one small business manufacturer that's been awarded government contract for that class of business, or for that class of products, over the previous 24 months, then SBA will deny the class waiver request.

Slide 36. These are procedures for requesting and establishing a class waiver. Anybody can request the class waiver. It could be a government agency, or business, or an association, or an individual, they can make a request to SBA to consider a class waiver for classic products, and also requires that the class waiver includes, a statement, the class of products to be waived, and we prefer that to be in the same format as we issue the class waiver, so that's the NAICS code, the PFC, and the description, and we require that there will be information detailed information on the efforts to identify domestic small business manufacturers for the cost of product.

Slide 37 please. Once that has been received, the request for waiver, SBA will perform its own market research to determine whether or not there has been a small business manufacturer that has been awarded a government contract for that product within the last two years. If no small business manufacturer is found by SBA, than SBA will publish a notice in the Federal Register, and the **[00:42:03 inaudible]** announcing our intent to establish class waiver, and then we'll provide for a public comment period at least 15 days, and oftentimes much longer than that, and then we'll see if there any comments, so for example, we might receive a comment that, Oh, actually there is a small business manufacturer out there, or will receive comments saying, perhaps someone has looked for small business manufacturers, and not found any. At the at the end of receiving those comments, SBA will provide a final notice stating whether or not SBA found small business manufacturers, and determining whether or not there should be a class waiver granted.

Next slide please, slide 38. SBA does not have any time limitations on class waivers. The class waivers issued from the 1980's that are still in effect today, because there have been no new small business manufacturers that have popped up in that particular industry. But we do publish our class waivers on our website, and you can find them in the Federal Register as well if there is the introduction of a small business manufacturer in an industry, then SBA will consider terminating that class waiver, will go through that same Federal register process of publishing in the Federal Register, and attend to terminate the class waiver providing a public comment period, and then issuing a federal register notice. Recently went through that process for rubber gloves, and terminated the class waiver for rubber gloves, after funding back there was a small business manufacturer of that.

Slide 39. As you can see, the SBA class waivers are available at the website that URL. You can check that URL for the most current list of class waivers, and you can use that to apply the non-manufacturer rule to your procurement. Again, if there's a class waiver available for products, the agency does not have to request an individual waiver from SBA. That class has already been determined there's no small business manufacturers, so

SBA has conclusively waived the fourth element of the non-manufacturer rule for that class of product.

Make sure to keep track of that class waiver terminations such as rubber gloves, as I mentioned, and always check the list for up to date effective class waivers before issuing a small business set-aside supply contract.

Slide 40, please. This slide applies both to the individual waivers, and to the class waivers, and instructions on how to submit NMR waiver requests. You can submit them by email to nmrwaivers@sba.gov, and please include your market research, in that email, whether it be an individual waiver. For individual waivers, we request that you provide a solicitation number, and agency abbreviation in the subject line, so that we can make sure to keep your waiver requests separate from other ones that we receive. Then for class waivers in the subject line, please include the NAICS code, the PSC, and the description of the product. So again, that we can keep this separate from other types of waiver requests that we get.

Slide 41, please. Here, still on the procedure on how to submit NMR waiver request. If you have an individual waiver granted, not talking about class waivers, the individual waivers from SBA, that waiver applies to a one-time award, so you go back out, what that means is we go back out under a separate solicitation separate award for that product. We would again have to request a waiver and get a waiver granted by SBA. In other words, the individual waiver is not like a class waiver. It is does not apply to every award **[00:46:16 inaudible]**, and the waiver also does not apply to modifications that are outside the scope of the contract, or to other procurement actions.

The effects of the waiver is that allows an otherwise qualified small business to supply the product other than small, large, manufacturer, processor on a small business set-aside contract, or contract on there are one of those four programs **[00:46:44 inaudible]**. to have them.

SBA does not have authority over the Buy American Act, or the Trade Agreements Act, so the waiver does not mean the non-manufacturer rule does not waive those other legal requirements to Buy American Act and the Trade Agreements Act. All that we are wavering, the issue of waiver is an exception to the fourth elements of the non-manufacturer rule.

Next slide, please. Okay, that concludes our formal presentation for today, and we welcome any questions that you might have.

Chris: Gwen, I'll give you a minute, I know there's quite a few questions out there. Sam and Carol, thanks for providing a great presentation here today. Like I mentioned, Gwen will be coordinating all those questions and getting those outgoing. Gwen, are you ready?

Gwen: Yes, I am. I have 11 so far most of them pertain to slide 17. So, the basic questions that I've gotten from several people is they need clarification on the non-manufacturer rule not applying to 8(a), HUBZone, SDVOSB and WOSB programs. can we maybe go over that?

Sam: Sure. So, non-manufacturer rule. Thank you for putting slide 17 backup on there. The non-manufacturer rule applies to all of SBA programs, but there are sections below certain dollar threshold, and the exceptions depend on which program the agency is using. Let me first carry out this by stating that these are the rules that are in SBA's regulation that 13 CFR 121.46. These exceptions are not yet reflected in the FAR, so if you look at the FAR, the FAR has separate dollar threshold from what is an SBA's regulations. However, SBA regulations are more up to date, and keeping with more current regulatory and statutory changes.

Let me go through how this works by program. For the social economic programs, which are 8(a), service-disabled vet owned under SBA rules, HUBZones, and the women-owned small business and economically disadvantaged women in small business. The non-manufacturer rule applies above the micro-purchase threshold, but essentially no threshold. exceptions for those programs. If the agency has issued a small business set-aside that is not in one of those programs, to say that any small business is eligible to bid on that small business set-aside, with agencies often refer to as a total small business set-aside.

In that case, the non-manufacturer rule will has an exception between the micro-purchase threshold and a simplified acquisitions threshold. That means that the non-manufacturer rule applies above the simplified acquisitions threshold for small business set-aside, but does not apply below the simplified acquisition threshold. I did not mention this previously, and I want to just want to make this point that I think it has led to some confusion, the non-manufacturer rule also applies to set-aside task orders. That's clear in SBA's rules that the non-manufacturer rule applies to set-aside contracts, and it applies to set-aside task orders.

Gwen: Okay, somebody asked about the interpretation of difference between a software subscription and a perpetual license. That was one of the exceptions.

Sam: Okay.

Carol: Page 18.

Sam: The rule here, let me find this rule, I can be more specific. Generally, what we say is that software as a service is not subject to no-manufacturer rule, because it's not a supply contract. I'll read you the exact what it says, "Subscription services, remote hosting a software data or other applications on servers or networks of a party other than the US government are considered by SBA to be services and not the procurement the supply item. Therefore, SBA will not grant waivers on the non-manufacturer for these types of services, but generally, SBA would consider software that is not a service to be a supply item.

I suppose, the example I gave was a perpetual license of software, where you're not buying by subscription. There might be other examples as well. You might have a shorter term than perpetual that could still be considered as a supply, but will not be considered subscription service. In that situation, you may want to contact us to see whether it fits into that subscription service category, or it fits into the general categorization of software as a supply.

If you want to see the actual regulatory description, it's in SBA rule 121.1203 D as in David 3.

Gwen: The next question is, does the sole source of water to a small business concern meet the definition of a small business set-aside, and does NMR apply to those sole source awards under FAR part 6.3?

Sam: It's a justification for the sole source award, that there's only one responsible source. Then that's not an acquisition conducted under SBA program, so it wouldn't be subject to the non-manufacturer rule. However, if the justification is that the agency is using the 8(a) source authority, or the HUBZone source of authority or service-disabled vet source authority, then that would be under SBA's program, that it would be non-manufacturer **[00:53:36 inaudible]**, but if you're just doing the only one responsible fourth under FAR Part 6, and that's not a SBA procedure. So, you would not have to apply them in non-manufacturer rule, in that event.

Gwen: Next question is, does SBA ever make an individual waiver, a class waiver, and if so, under what circumstances would it do that?

Carol: I can take this one. I believe if we had enough requests for certain type, then that would refer the request for a class waiver, but which anyone could apply for, but I've personally not had that happen. I don't know if that happening yet. Do you want to take a chance maybe per say?

Sam: Yes, I think that's right. If we continuously got individual waiver requests for a particular type of product, then we can initiate our own class waiver, proceeding by location, Federal register and **[00:54:40 inaudible]**

Gwen: We had a couple of questions on slide 38, regarding the termination of an existing NMR waiver, if there's only one small business that manufacturers, how does that help the agency meet that rule of two?

Sam: Those are two separate requirements. One is, under authority, we cannot grant a waiver if there's a small business manufacturer that's out there, and if there is one small business manufacturer on the agency side, then the agency might not find that the rule to satisfy, so certainly if there is only small business manufacturer agency will be justified in finding the rule **[00:55:28 inaudible]** Those two requirements don't necessarily have to do with one another.

Gwen: Okay. Next question is for a waiver. What if market research has small businesses that say they could develop the item if given time that they currently do not make or supply the item.

Carol: Then that would go to their experience, and the contract enough so we would value it whether that manufacturer could actually meet, but there has to be a history of being able to meet such solicitation. They can't just say they're going to do it, or they plan to do it. There has to be more to it than that. They have had some experience.

Gwen: Next question is, does NMR normally apply under valid emergency situations if there's no small businesses that can provide it? Can the contracting officer proceed without coordination with the SBA?

Sam: No, SBA has to--- I think the question is, can the contracting officer waive the NMR, without SBA cooperation, and the answer to that is no. SBA has to be able to review the waiver requests and provide a determination on whether the requirement is waived. Now, if it's a small business set-aside, and you don't need a waiver, because there is a small biz manufacturer out there, then you don't need to coordinate with SBA. The firm that is providing the product, if it provides products than the small business and satisfies the rule, then there is no need for waiver.

Gwen: I only have two more questions. One is regarding the NASA's suits contracts, and the army chest contracts, does the NMR apply when making purchases them on those mandatory contracts?

Sam: I'm not familiar with chest, I think NASA's suit is under that IT value-added reseller exception that we discussed, the one doing 150 employees, but NASA suit at least the one that is coming to an end soon I believe, was issued before SBA decided to apply the non-manufacturer rule to IT value-added resellers. So, is essentially non-manufacturers did not apply, because SBA's rule didn't apply to IT value-added resellers at the time that NASA issues that suit contract. I think NASA's coming out with another suit, and I don't know what the NAICS code, and what the status is on the following suit, and chest, I'm not familiar with that contract. I'm not sure.

Gwen: Okay. That's a program where the army buys all their IT hardware and software, and there's multiple, it's a multiple award contract, but it's mandatory for DOD to make their purchases off of that.

Sam: I think generally what we would consider is first what's the NAICS code on the order. If the NAICS code is a supply NAICS code, than the non - manufacturer rule would apply. If the order is set-aside for small business. If it's a full open order than the non-manufacturer rule will not apply. It only applies to SBA. **[00:59:19 inaudible]** But certainly the non-manufacturer rule applies at the order level has been set by the **[00:59:24 inaudible]** level

Gwen: Next question, does the NMR apply to leased equipment contracts over this Act?

Sam: Generally, we consider leases to be services, but it depends on the NAICS code. If there's a list NAICS code, it's probably a service NAICS code, and the NMR would not apply. But if the NAICS code is a supply NAICS code, then we would apply the NMR. It's more what NAICS code that contract is classified under than it is the description of the contract.

Gwen: Okay, and one more question came in referencing a specific NAICS code 324191 petroleum, lubricating oil, and grease manufacturing. They're wondering if that NMR rule applies to that? Would that be something that would be on the class waiver list? If so, we've had a couple questions come in that the list that's online is June 2016, is there any list?

Sam: There's not a new list? We haven't granted class waiver in some time, although terminating class waivers. We haven't granted one in a while. I'm not familiar with the list, whether it has a particular NAICS code,

Gwen: I’m not.

Sam: So, we'd have to follow up whether that particular item is on the waiver list.

Gwen: Okay. I've got a bunch more that are still coming in. Chris, how are we doing for time?

Chris: We are just a minute past, but if you if you got time to do a couple more let's do it.

Sam: Sure, it's fine.

Chris: Perfectly.

Gwen: This one, do you recommend non-manufacturers to include a manufacturing NAICS code in their firm registration? Sam

Sam: Yes, it should do that.

Gwen: Could a business apply for an NMR exception related to specific NAICS anytime, or only during an open solicitation?

Sam: For a class waiver, you can submit that anytime, but for an individual waiver we only accept individual waiver request from agencies not from businesses.

Gwen: Okay, let's see. This one. Would a business that is a one man, woman/woman office that just has a phone and a computer, and does not handle the products that all be considered for NMR. There is an agency that procures food products, and there are a lot of businesses like that.

Sam: I think you have to know more about the industry practice in that category of the non-manufacturer rule says that, the business must take possession or ownership consistent with industry practice. We usually refer to the agency to tell us what the industry practice is, but the practices that comments in the industry to do that, then it possibly could qualify under the non-manufacturer rule.

Gwen: Looks like that either I haven't seen any new ones coming in. So, that's all for the questions.

Chris: Okay, and if for some reason there was a question that somebody to ask, and hadn't been answered, or you want more clarification, you can feel free to reach out to us at sbalearning@sba.gov. The slide is currently up right now, or feel free to reach out directly to Carol and her email address is on slide 42, or if you're looking at the screen, it's here as well,

Carol and Sam, I want to thank you guys for having a great presentation and answering all the questions that we did have. So once again, thank you, and thank you for all those who are on the line as well, and hopefully have a great day. Thank you.

Carla: Thank you for joining today's conference. The session has now concluded and you may disconnect.

[END OF TRANSCRIPT]