

Teaming on Small Business and Other Federal Set-Asides

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What We Will Cover

- Types of Small Business Teaming
 - Small Business Joint Ventures
 - Small Business Prime/Sub Teams
 - Affiliation Rules
- Mentor-Protégé Programs
 - Exception to Affiliation
 - Recent SBA Regulation Changes (Effective March 14, 2011)
- The Small Business Job Act of 2010

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Teaming Under FAR Part 9.6

FAR 9.601 Reads:

- “**Contractor team arrangement**,” as used in this subpart, **means** an arrangement in which—
 - Two or more companies form a partnership or **joint venture** to act as a potential prime contractor
 - A potential **prime contractor** agrees with one or more other companies to have them act as its **subcontractors** under a specified Government contract or acquisition program.

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Small Business Joint Ventures

- Two or more concerns form a joint venture to pursue federal procurements. (13 CFR 121.103(h)).
- Gross receipts are aggregated – automatic affiliation
 - Exception for SBA 8(a) Mentor Protégé Program

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Small Business Prime/Sub Team

- SB prime contractor agrees with one or more subcontractors to submit an offer on a SB set-aside procurement.
 - The prime/sub team is small if the prime contractor qualifies as small for the procurement.
 - A large business or businesses can serve as a subcontractor on a prime/sub team.

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What are Performance of Work Requirements?

- FAR clause 52.219-14, "Limitations on Subcontracting" specifies % of contract work that must be performed by the small business prime contractor.
- Addressed in detail at 13 CFR 125.6.
- For general construction, a small prime must perform at least 15% of the cost of the contract, not including the cost of materials, with its own employees.

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What is Affiliation?

Two Kinds of Affiliation

- Contract-Specific:
 - Based on joint venture agreement or “ostensible subcontractor” rule.
 - Ostensible Subcontractor Rule = (1) prime is “unusually reliant” on subcontractor to perform and/or (2) the subcontractor performs “primary and vital” requirements of the contract
 - Finding of affiliation only applies to the current contract.

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What is Affiliation – Cont'd

- Determining General Affiliation is a Fact-Specific Inquiry:
 - Based on “Totality of the Circumstances” including:
 - Common ownership/control
 - Identical/substantially identical business or economic interests
 - Newly organized concern
 - Common facilities or employees
- If one firm was a small business, it is not anymore.

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What Agencies Have Mentor-Protégé Programs?

- The SBA (13 CFR Part 124.520)
- DoD (DFARS Part 219.71; DFARS Appx. I; §831(j))
- GSA (48 CFR 519.70)
- NASA (48 CFR Part 1819.72)
- Veterans Affairs (48 CFR Part 819.71)
- DHS (48 CFR Part 3052.219)
- DoE (48 CFR Part 919.70)

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The SBA Mentor-Protégé Program

- 13 CFR § 124.520
- Protégés are limited to 8(a) SBCs
- Non-Affiliation Rule (Part 124)
- Broad Exception to the Affiliation Rule (Part 121)
- Ability to own 40% of the protégé
- New Regulations out March 14, 2011

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SBA's Non-Affiliation Rule 13 CFR § 124.520(d)(4)

- "No determination of affiliation or control may be found between a protégé firm and its mentor based on the mentor/protégé agreement or any assistance provided pursuant to the agreement."
- Exception to affiliation repeated in 13 C.F.R. § 121.103(h)(3)(iii): "Two firms approved by SBA to be a mentor and protégé under 13 CFR 124.520 may joint venture as a small business for any Federal Government procurement"
- Mentor and protégé may joint venture for small business and 8(a) set-asides.

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Recent Changes to SBA Regulations

- 76 Fed. Reg. 8222 (February 11, 2011)
 - Effective Date: March 14, 2011
- Mentor and protégé may still joint venture for all small business set-aside contracts.
- Mentor and protégé may joint venture for subcontracts.
- In most circumstances, mentor may serve as a subcontractor to the mentor-protégé joint venture prime contract.

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Recent Changes to SBA Regulations

- However, the joint venture must now comply with 8(a) requirements, even if competing for a non-8(a) contract.
 - Must comply with percentage of work requirements:
 - Protégé must self-perform 40 percent of the work

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Recent Changes to SBA Regulations

- Must also comply with 8(a) program joint venture agreement content requirements, including:
 - Provision that makes protégé firm the managing venturer.
 - Provision that makes a protégé firm employee the project manager.

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Recent Changes to SBA Regulations

- "3/2 Rule"
 - A mentor-protégé joint venture may not be awarded more than 3 contracts in a 2 year period.
 - However, the same mentor and protégé may create a new joint venture agreement to compete for 3 more contracts in the 2 year period.
 - SBA comments that at some point, the firms would have a continuing relationship that would make them generally affiliated.

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Recent Changes to SBA Regulations

- SBA recognizes an exception to affiliation for the DoD Mentor-Protégé Program.
 - But, probably no joint venturing under DoD Program.
 - Focus is on mentor subcontracting to protégé.
- SBA will not recognize further exceptions for other agency mentor-protégé programs.

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The Small Business Jobs Act of 2010

September 27, 2010

- **Section 1345:** requires GAO to study the program so that it "is not just a mechanism to enable participants that would not otherwise qualify under Section 8(a) ... to receive contracts under that section."
- **Section 1347:** states that the SBA may establish mentor-protégé programs for SDVOSBs, WOSBs, and HUBZone SBCs.
- **Section 1313:** limits the bundling of contracts to \$2 million.
- Ended HUBZone advantage – parity between small businesses.

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The Small Business Jobs Act of 2010

"Small Business Size and Status Integrity"

- Must certify small business status, subject to heightened False Claims Act liability.
- "In every contract, subcontract, . . . or grant which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a presumption of loss to the United States based on the total amount expended on the contract, subcontract, . . . or grant whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation."

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Takeaway

- The SBA Mentor-Protégé is the “gold standard” and provides exceptions to the normal affiliation rules.
- The March 14, 2011 rules put the DoD Mentor-Protégé program on (almost) equal footing with the SBA program.
- All other Federal Mentor-Protégé Programs provide no exceptions to general affiliation rules.

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Code of Federal Regulations (CFR)

- <http://ecfr.gpoaccess.gov>
- Size regulations -- 13 CFR Part 121
- 8(a) & SDB regulations -- 13 CFR Part 124
- Government Contracting Programs -- 13 CFR Part 125.6
- HUBZone Program -- 13 CFR Part 126

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Questions?

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Friday June 17, 2011

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