



PROGRAM MATERIALS
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The ABCs of SBA JVs

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The ABCs of SBA JVs

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Outline

- Introduction to Joint Ventures
- Small Business Administration (SBA) Joint Ventures Regulations
- Proposed Rule – Changes to the Federal Acquisition Regulation (FAR) and Implications
- Practical Implications

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What Is A Joint Venture?

- No universal definition, but courts/regulations offer some guidance
- A joint venture is an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term, or a corporation, and they agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each coadventurer shall stand in the relation of principal, as well as agent, as to each of the other coadventurers, with an equal right of control of the means employed to carry out the common purpose of the adventure.

Lentz v. United States, 346 F.2d 570, 575 (Ct. Cl. 1965)

Joint Venture or Subcontract?

- “In government contract law, a joint venture is a single entity, comprised of more than one individual or organization, which contracts with the government.”
- “On the other hand, when two parties agree to perform jointly a contract which one has earlier secured with a third party like the government, the new party is called not a joint venturer, but a subcontractor.”

E. Trans-Waste of Maryland, Inc. v. United States,
27 Fed. Cl. 146, 149 (1992)(citations omitted)

Joint Venture or Contractor Team Arrangement?

48 C.F.R. § 9.601

Contractor team arrangement, as used in this subpart, means an arrangement in which—

- (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
- (2) 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

Why Would I Want To Enter Into A Joint Venture?

- Joint Ventures Generally
 - Expand offerings and enter new markets
 - Strategic partnership to increase competitiveness of bid
 - Reduce business risk
 - Responsibility determinations

SBA JV Regulations

Definition of Joint Ventures (for Purposes of Affiliation) in SBA Regulations

13 C.F.R. § 121.103(h) – Affiliation Based on Joint Ventures

- An association of individuals and/or concerns with interests in any degree or proportion
- Consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period
- For which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally

Why Would Small Businesses Enter Into A Joint Venture?

- Mentor-Protégé
 - Small Businesses: Technical, management, financial and/or contracting assistance from established government contractors
 - Large Businesses: Expanded access to small-business set-aside procurements, establish strategic partnerships

Joint Ventures In Government Contracting – Small Business Set-Asides

- Current federal procurement goal aims to award, or “set-aside,” at least 23 percent of all government contracting dollars for small businesses
- A joint venture of two or more business concerns may submit an offer as a small business so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, or qualify as small under one of the exceptions to affiliation
- Mentor-Protégé Programs are designed to provide small businesses with business development assistance and to enhance their ability to successfully compete for federal contracts
- Mentors and Protégés may choose to form JVs for purposes of competing for a federal contract

“All Small” Mentor-Protégé Program

- 13 C.F.R. § 125.9, What are the rules governing SBA's small business mentor-protégé program?
- To be eligible to participate in the program:
 - Prospective Protégé must be either a for-profit business or an agricultural cooperative that is considered “small” for the NAICS code in which the business is requesting a Mentor-Protégé relationship
 - Prospective Protégé must have prior experience working in the NAICS code in which it is seeking assistance
 - Mentor must be organized for-profit and cannot own more than 40% equity in Protégé business
 - The SBA has not made a determination of affiliation between Protégé and Mentor
 - Both Mentor and Protégé have active SAM registrations

“All Small” Mentor-Protégé Program (cont’d)

- Protégé can only have one Mentor at a time, and cannot have more than two mentors across all SBA-administered Mentor-Protégé programs
- Mentors may have no more than three protégés
- The SBA may authorize a small business to be both a Mentor and a Protégé if the second relationship won’t compete or conflict with the first Mentor-Protégé relationship

“All Small” Mentor-Protégé Program (cont’d)

- Types of Assistance
 - Management and technical assistance (*e.g.*, HR and accounting systems, manufacturing assistance, and technology transfers)
 - Financial assistance (*e.g.*, equity investments or loans)
 - Contracting assistance (*e.g.*, contract performance and joint venture agreements)
 - Trade education (*e.g.*, identifying markets and export assistance)
 - Business development assistance (*e.g.*, business planning, marketing, networking, and relationship building)
 - General, and administrative assistance (*e.g.*, daily operations, capacity building, and bonding)
- **NOTE: The SBA will not approve a Mentor-Protégé Agreement unless it determines that the Mentor-provided assistance will promote real developmental gains for the protégé business, and is not merely a vehicle for the Mentor to receive federal small business set-asides**

“All Small” Mentor-Protégé Joint Ventures

Mentors and Protégés may enter into JVs to compete for contracts

- 13 C.F.R. § 125.8, What requirements must a joint venture satisfy to submit an offer for a procurement or sale set aside or reserved for small business?
- Highlights:
 - Joint venture agreement must be in writing
 - Joint venture may be in the form of a formal or informal partnership
 - If a separate legal entity joint venture, the small business must own at least 51% of the joint venture entity
 - May not be populated with individuals intended to perform contracts awarded to the joint venture
 - Administrative employees may be employed by the joint venture
 - The amount of work done by the partners will be aggregated and the work done by the small business protégé partner must be at least 40% of the total done by the partners

“All Small” Mentor-Protégé Joint Ventures (cont’d)

- The joint venture must perform the appropriate percentage of work based on the subcontracting requirements
 - The joint venture must comply with limitations on subcontracting prescribed at 13 C.F.R. § 125.6.
 - Of the work performed by the joint venture, the protégé firm must perform at least 40 percent of that work
 - BEWARE DOUBLE-COUNTING: in determining the amount of work done by a mentor participating in a joint venture with a small business protégé, all work done by the mentor and any of its affiliates at any subcontracting tier will be counted
 - The joint venture must submit annual reports to the SBA and the contracting agencies explaining how the work is being performed for each contract
- **NOTE: SBA must approve the mentor-protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract in order for the joint venture to receive the exclusion from affiliation**

8(a) Mentor-Protégé Program

- 13 C.F.R. § 124.520 What are the rules governing SBA's Mentor/Protégé program?
- 8(a) Protégé eligibility:
 - Already be enrolled in the 8(a) program and be in good standing
 - Qualify as small for the size standard corresponding to its primary NAICS code
 - Or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code
 - Demonstrate how the business development assistance to be received through its proposed mentor-protégé relationship would advance the goals and objectives set forth in its business plan
- All-Small was designed with 8(a) Mentor-Protégé program as a model
- SBA has proposed consolidation of the two programs – eliminate confusing and duplicative regulations

8(a) Joint Ventures

- 13 C.F.R. §124.513, Under what circumstances can a joint venture be awarded an 8(a) contract?
- If approved by SBA, an 8(a) concern may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts
- A joint venture agreement is permissible only where:
 - An 8(a) concern lacks the necessary capacity to perform the contract on its own
 - Agreement is fair and equitable
 - Agreement will be of substantial benefit to the 8(a) concern

NOTE: Where SBA concludes that an 8(a) concern brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA will not approve the joint venture arrangement.

8(a) Joint Ventures – Mentor-Protégé Agreements

- A joint venture between a protégé firm and its approved mentor will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the contract and has not reached the dollar limits set forth in 13 C.F.R. §124.519
- SBA approval of a joint venture agreement does not equate to a formal size determination
 - Despite SBA's approval of a joint venture, the size status of a joint venture that is the apparent successful offeror for a competitive 8(a) contract may be protested

Changes to the FAR - SBA JV Requirements

Proposed Rule – Federal Acquisition Regulation: Policy on Joint Ventures

- 85 FR 34561
- FAR Case 2017-019
- Published on June 5, 2020
- Comments due August 4, 2020
- Proposes FAR amendments to implement statutory and regulatory changes regarding joint ventures made by the Small Business Administration (SBA) in its final rule published in the Federal Register on July 25, 2016
- Clarifies that 8(a) joint ventures are not “certified” into the 8(a) program and that 8(a) joint venture agreements need only be “approved” by the SBA prior to contract award

Proposed Rule: Federal Acquisition Regulation: Policy on Joint Ventures (cont'd)

- Revises the definition of “small business concern”
- Clarifies the consideration of past performance of parties to a JV
- Addresses how a JV may qualify as a small business concern or under the Small Business Administration’s (SBA) socioeconomic programs
- Removes instructions for contractors in FAR Subpart 19.7 that already exist in the clause at FAR 52.219–8, Utilization of Small Business Concerns
- Amends FAR Subpart 19.8, Contracting with the Small Business Administration (the 8(a) Program), to clarify that at least one party to the JV must be certified as an 8(a) Program participant at the time of proposal submission (and that the 8(a) JV agreement must be approved prior to contract award)
- Amends several contract clauses to add the requirement that certain small business or socioeconomic parties to a joint venture perform at least 40 percent of the work to be performed by that joint venture (and that is beyond mere “administrative functions”)

“Small Business Concern”

- Existing definition of “small business concern” in FAR 2.101 references the criteria and size standards in 13 CFR Part 121, but then supplements the basic definition by specifying what factors should be considered “in determining whether dominance exists”:
 - “Such a concern is ‘not dominant in its field of operation’ when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration must be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity. (See 15 U.S.C. 632)”
 - Invites inappropriate ad hoc interpretations of a contractor’s status as a small business concern
- **The Proposed Rule eliminates this explanatory language from the definition of “small business concern” entirely, which may in turn eliminate inconsistent, episodic interpretations by agencies**

FAR Subpart 9.1 – Responsible Prospective Contractors

- FAR 9.104-1, General Standards

To be determined responsible, a prospective contractor must—

(c) Have a satisfactory performance record (see 9.104–3(b) and subpart 42.15). A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104–2...

Responsibility Determination

■ FAR 9.104-3, Application of Standards

(b) Satisfactory performance record. A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of the contract is a significant factor to consider in determining satisfactory performance. The contracting officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination. If the pending contract requires a subcontracting plan pursuant to Subpart 19.7, The Small Business Subcontracting Program, the contracting officer shall also consider the prospective contractor's compliance with subcontracting plans under recent contracts.

Responsibility Determination - Evaluations of Joint Venture Past Performance

- **Current 9.104(c):**

Affiliated concerns. Affiliated concerns...are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the contracting officer shall consider the affiliate's past performance and integrity when they may adversely affect the prospective contractor's responsibility.

- **Proposed 9.104(c)(2):**

Joint ventures. For a prospective contractor that is a joint venture, the contracting officer shall consider the past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture.

FAR 15.305, Proposal Evaluation

(a) Proposal evaluation is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully. An agency shall evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.

Current FAR 15.305(a)(2) – Past Performance Evaluation

- (i) Past performance information is one indicator of an offeror's ability to perform the contract successfully. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This comparative assessment of past performance information is separate from the responsibility determination required under subpart 9.1.
- (ii) The solicitation shall describe the approach for evaluating past performance, including evaluating offerors with no relevant performance history, and shall provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the Government requirement. The solicitation shall also authorize offerors to provide information on problems encountered on the identified contracts and the offeror corrective actions. The Government shall consider this information, as well as information obtained from any other sources, when evaluating the offerors past performance. The source selection authority shall determine the relevance of similar past performance information.

Current FAR 15.305(a)(2) – Past Performance Evaluation (cont'd)

- (iii) The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition
- (iv) In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance
- (v) The evaluation should include the past performance of offerors in complying with subcontracting plan goals for small disadvantaged business (SDB) concerns (see subpart 19.7).

Evaluations of Joint Venture Past Performance

- Proposed 15.305(a)(2)(vi):

For offerors that are joint ventures, the evaluation shall take into account past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture.

FAR Part 19 – Small Business Programs

- Subpart 19.3, Determination of Small Business Status for Small Business Programs
 - Amended to address how a joint venture may qualify for an award as a small business concern or under the socioeconomic programs
 - Similar text is added to subparts 19.13, Historically Underutilized Business Zone (HUBZone) Program; 19.14, Service-Disabled Veteran-Owned Small Business Procurement Program; and 19.15, Women-Owned Small Business Program
 - Similar text is also added to FAR 52.212–3, Offeror Representations and Certifications—Commercial Items; FAR 52.219–1, Small Business Program Representations; FAR 52.219–8, Utilization of Small Business Concerns; FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Participants; FAR 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside; FAR 52.219–29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns; and FAR 52.219–30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women- Owned Small Business Program.

FAR Part 19 – Small Business Programs (cont'd)

- Subpart 19.7, The Small Business Subcontracting Program. This subpart is amended to remove instructions for contractors that already exist in the clause at FAR 52.219–8, Utilization of Small Business Concerns.
- Subpart 19.8, Contracting with the Small Business Administration (the 8(a) Program):
 - Amended to add language to FAR sections 19.804–3, SBA acceptance, and 19.805–2, Procedures, to clarify that at least one party to the joint venture must be certified as an 8(a) program participant at the time of proposal submission and that the 8(a) joint venture agreement shall be approved prior to contract award
 - In addition, pursuant to 13 CFR 124.503 and 13 CFR 124.507, language is added to clarify the general time period within which SBA expects to approve the joint venture agreement prior to award and the procedure to follow if a response is not received within that time period. The rule also proposes to delete text from 19.805–2(b) relating to how SBA determines eligibility because it creates confusion regarding the timing of SBA's determination

Small Business Representation

- Current 19.301-1 – Representation by the offeror.

(a) To be eligible for award as a small business concern identified in 19.000(a)(3), an offeror is required to represent in good faith –

(1)

(i) That it meets the small business size standard corresponding to the North American Industry Classification System (NAICS) code identified in the solicitation; or

(ii) For a multiple-award contract where there is more than one NAICS code assigned, that it meets the small business size standard for each distinct portion or category (*e.g.*, line item numbers, Special Item Numbers (SINs), sectors, functional areas, or the equivalent) for which it submits an offer. If the small business concern submits an offer for the entire multiple-award contract, it must meet the size standard for each distinct portion or category (*e.g.*, line item number, SIN, sector, functional area, or equivalent); and

(2) The Small Business Administration (SBA) has not issued a written determination stating otherwise pursuant to 13 CFR 121.1009.

Small Business Representation (cont'd)

- Proposed 19.301-1:

- (a)

- ***

- (2)(i) A joint venture may qualify as a small business concern if the joint venture complies with the requirements of 13 CFR 121.103(h) and 13 CFR 125.8(a) and (b) and if—

- (A) Each party to the joint venture qualifies as small under the size standard for the solicitation; or

- (B) The protégé is small under the size standard for the solicitation in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under an SBA mentor-protégé program

- (ii) A joint venture may qualify for an award under the socioeconomic programs as described in subparts 19.8, 19.13, 19.14, and 19.15

Clarifications – Certification of 8(a) Joint Ventures and Eligibility for Award

- Current FAR 52.219-18(a), Notification of Competition Limited to Eligible 8(a) Participants:

(a) Offers are solicited only from small business concerns expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) Program and which meet the following criteria at the time of submission of offer—

(1) The Offeror is in conformance with the 8(a) support limitation set forth in its approved business plan; and

(2) The Offeror is in conformance with the Business Activity Targets set forth in its approved business plan or any remedial action directed by the SBA

Clarifications – Certification of 8(a) Joint Ventures and Eligibility for Award (cont'd)

- Agencies have interpreted this to mean that 8(a) joint ventures that submit an offer for an 8(a) contract must be certified by the SBA at the time they submit their offer for that contract
 - 8(a) joint ventures are newly formed and are not “certified” into the 8(a) Program at the time of submission of an offer
 - Instead, 8(a) joint venture agreements need only be approved by the SBA prior to contract award. See 13 C.F.R. §124.503, 13 C.F.R. §124.507
- Proposed changes are intended to prevent the improper elimination of 8(a) joint venture proposals from award consideration based on a misunderstanding of the eligibility requirements

Clarifications – Certification of 8(a) Joint Ventures and Eligibility for Award (cont'd)

■ Proposed 52.219-18(a):

(a) Offers are solicited only from—

(1) Small business concerns expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) program and which meet the following criteria at the time of submission of offer—

(i) The Offeror is in conformance with the 8(a) support limitation set forth in its approved business plan; and

(ii) The Offeror is in conformance with the Business Activity Targets set forth in its approved business plan or any remedial action directed by the SBA; or

(2) A joint venture, in which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause, that complies with 13 CFR 124.513(c); or

(3) A joint venture—

(i) That is comprised of a mentor and an 8(a) protégé with an approved mentor-protégé agreement under the 8(a) program;

(ii) In which at least one of the 8(a) program participants that is a party to the joint venture complies with the criteria set forth in paragraph (a)(1) of this clause; and

(iii) That complies with 13 CFR 124.513(c)

Clarifications – Certification of 8(a) Joint Ventures

- Proposed 52.219-18(e):

(e) 8(a) joint ventures. The Contracting Officer may consider a joint venture for contract award if SBA approves the joint venture agreement and provides a determination of eligibility pursuant to 13 CFR 124.507(b) prior to contract award

Percentage of Work Performed by Small Business/Socioeconomic Party

- The Proposed Rule would amend several contract clauses to add the requirement that certain small business or socioeconomic parties to a joint venture “perform 40 percent of the work performed by the joint venture and that the work performed must be more than administrative functions.”

Affected Clauses

- FAR 52.219–3, Notice of HUBZone Set-Aside or Sole Source Award
- FAR 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns
- FAR 52.219–14, Limitations on Subcontracting
- FAR 52.219–27, Notice of Service-Disabled Veteran-Owned Small Business Set-Aside
- FAR 52.219–29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-Owned Small Business Concerns
- FAR 52.219–30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program

Example: Notice of Service-Disabled Veteran-Owned Small Business Set-Aside

- Current 52.219-27(f):

(f) A joint venture may be considered a service-disabled veteran owned small business concern if—

- (1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and makes the following representations: That it is a service-disabled veteran-owned small business concern, and that it is a small business concern under the North American Industry Classification Systems (NAICS) code assigned to the procurement
- (2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement; and
- (3) The joint venture meets the requirements of 13 CFR 121.103(h)
- (4) The joint venture meets the requirements of 13 CFR 125.15(b)

Example: Notice of Service-Disabled Veteran-Owned Small Business Set-Aside

■ Proposed 52.219-27(f):

(f) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one party to the joint venture complies with the criteria defined in paragraph (a) of this clause and 13 CFR 125.18(b)(2); and

(2) Each party to the joint venture is small under the size standard corresponding to the NAICS code assigned to the procurement, or the protégé is small under the size standard corresponding to the NAICS code assigned to the procurement in a joint venture comprised of a mentor and protégé with an approved mentor-protégé agreement under an SBA mentor-protégé program

Example: Notice of Service-Disabled Veteran-Owned Small Business Set-Aside (cont'd)

- Proposed 52.219-27(g):

(g) In a joint venture that complies with paragraph (f) of this clause, the service-disabled veteran-owned small business party or parties to the joint venture shall perform at least 40 percent of the work performed by the joint venture. Work performed by the service-disabled veteran-owned small business party or parties to the joint venture must be more than administrative functions.

Practical Considerations

Steps to Take Now

- Begin exploring partnerships now – Mentor-Protégé Agreement must be in place before submission of offer as a joint venture
- Small businesses – prepare/revise business plan to identify areas in which assistance is required
 - Identify secondary NAICS codes as possible points of market entry
- 8(a) Mentor-Protégés – enter All-Small Program?
- Consider whether to form a formal or informal JV
 - Formal JVs may not be populated
 - Liability of informal JVs may vary based on state law
- Ensure meticulous compliance with all regulatory requirements

Preparing For The Future

- **Comments are due August 4, 2020**
- Changes to past performance evaluations apply to JVs regardless of size status – prepare to explore new opportunities
- Pay attention to the distribution of work in your JV's contract proposal – clearly demonstrate that at least 40% of the substantive work will be performed by the small business partner
- Check your representations and certifications/SAM registration for accuracy
- When submitting offer as a JV, be prepared to educate contracting officers about the changes to the evaluation requirements – may be appropriate to challenge inappropriate eliminations of 8(a) JV proposals through the bid protest process

Questions?

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