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July 23-26



 **NCMA**
NATIONAL CONTRACT MANAGEMENT ASSOCIATION



Maximizing Teaming Under the SBA's New Joint Venture Rules

Breakout Session #: **B04**

Presented by:

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Date: **Tuesday July 25, 2017**

Time: **2:30pm – 3:45pm**



Overview

- The SBA JV programs
 - Key attributes
 - Legal framework and requirements
- Interactive Session
- Practical Guidance to Joint Venturing in SBA's JV Programs
- *Not just another introduction to the All Small Mentor Protégé Program*



The SBA Joint Venture Programs

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The SBA Joint Venture Programs

- 8(a) Mentor-Protégé [MAJOR CHANGES]
- All Small Mentor-Protégé [BRAND NEW]
- Multi-Small Joint Ventures [MAJOR EXPANSION]
- Status Managed Joint Ventures [BRAND NEW]
 - Multi-Small
 - Mentor-Protégé



SBA's Joint Venture Rules Relevant Regulations

- [81 Fed. Reg. 48558](#) (Final Rule – Small Business Mentor-Protégé Programs)
 - Reflects major changes to the 8a MPP, and creation of the All Small MPP
 - Final Rule issued July 25, 2016 (Effective August 24, 2016)
- [81 Fed. Reg. 34243](#) (Final Rule - Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments)
 - Reflects major changes to multi-small and creation of status managed joint ventures
 - Final Rule issued May 31, 2016 (Effective June 30, 2016)
- [13 CFR 121](#) (Size and Affiliation)
- [13 CFR 124](#) (8a and 8a MP)
- [13 CFR 125](#) (SDVOSB and All Small MP)
- [13 CFR 126](#) (HUBZone)
- [13 CFR 127](#) (WOSB)
- [13 CFR 134](#) (OHA)



Why do the SBA Joint Venture Programs matter?

- Exemption from “affiliation”
 - Firm’s size is measured based on firm + “affiliates”
 - Normally JV members deemed automatic affiliates
 - BUT, for JV in covered by an SBA Joint Venture Program, the members are NOT automatic affiliates
- Benefits Large and Small Businesses
 - Large: Exemption from affiliation allows companies to bid on set-asides when they would normally be too large to bid
 - Small: Allows small business, who would otherwise qualify based on size/status, a competitive edge; and provides access to valuable training, guidance and resources



SBA's Mentor-Protégé Programs – Background History

- 1995 – Congress directs SBA to develop a program to “assist” 8(a) firms in performance of contracts
- 1998 – SBA establishes the 8(a) Mentor-Protégé Program
 - Encourages successful large businesses to provide various BD assistance to 8(a) firms, including: “technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing prime contracts with the Government in the form of joint venture agreements.”
 - Once SBA approves the MPA, the mentor and protégé firms can form joint venture(s) and are eligible to compete for any set-aside procurement that the 8(a) protégé would qualify for individually based on size/status



SBA's Mentor-Protégé Programs – Background History

- 2010 – Congress passes Small Business Jobs Act of 2010
 - Authorizes SBA to establish separate mentor-protégé programs, (modeled on the 8a MPP), for the SDVOSB, HUBZone, and WOSB programs
- 2013 – Congress passes FY2013 NDAA
 - Authorizes SBA to establish a mentor-protégé program for all small business concerns
- 2015 – SBA issues proposed rule for creation of the All Small Mentor-Protégé Program
 - Instead of implementing four new separate small business mentor-protégé programs, SBA proposes to implement one mentor-protégé program for all small businesses in addition to the existing 8(a) MPP



SBA's Mentor-Protégé Programs – Background History

- 2016 – SBA issues final rule creating All Small Mentor-Protégé Program (and modifying 8(a) MPP)
 - SBA launches All Small Mentor-Protégé Program Oct. 1, 2016
 - Benefits and requirements of All Small and 8(a) MPPs are similar (but not identical)
 - Exemption from Affiliation benefit carries over
 - All Small MPP is open to *any* small business to be a protégé (including 8a firms)
 - Once SBA approves the Mentor-Protégé Agreement, the mentor and protégé firms can form joint venture(s) and are eligible for any set-aside procurement that the protégé would qualify for individually based on size/status



SBA Mentor-Protégé Program – Major Changes

- SBA MPP opens up to Non-8(a) Protégés
- Relaxed Size Requirements for Protégés
- Potential for Size Qualification under Secondary NAICS Code
- Mentor Eligibility
- End of “populated” MP JVs



SBA Mentor-Protégé Program – Major Changes

- Limit on Number of Protégés a Firm Can Mentor across all MPPs [max. 3]
- Limit on Number of Mentors a Protégé Can Have in a Lifetime [max. 2]
- Limit on Duration of Mentor-Protégé Agreements and Renewals [3 years, x2]
- Transfer to All Small upon 8(a) Graduation



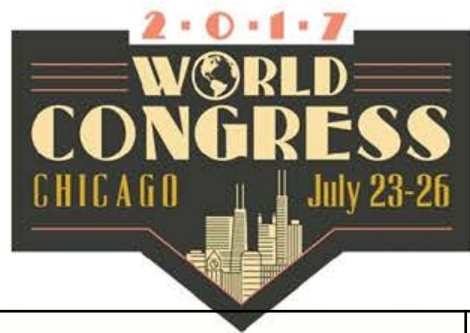
SBA Mentor-Protégé Program – Major Changes

- Disclosure of other MPAs – Benefit Received by Protégé under this MPA Must be Unique
- Size Protests Challenging Awards to MPs on 8(a) Set-Asides
- Mentor-Protégé joint ventures will be tracked through SAM.gov
- Potential Elimination of Mentor-Protégé Programs Run by Other Agencies (Other than DoD)



How do changes impact pre-existing 8(a) MP JVs?

- Do duration restrictions apply to MPs approved under the old regulation?
- How does a 8a MP relationship approved under the old reg. count against the 3-year (x2) term rule?
- Do MP relationships under the old regulation count against the no more than 2 different mentors in a lifetime rule?



All Small vs. 8(a) Mentor Protégé Programs – Key Diff.

	8(a) MPP	All Small MPP
Application	Paper Per SBA policy, both proposed mentor and protégé have to meet in person with SBA District Office before applying	All electronic/online
MPA review and approval process	Two-Stage District Office SBA National (AA/BD)	SBA Office of Government Contracting & Business Development
Need Pre-Approved JVA for 8(a) Set-Aside?	Yes	Yes
Need to have JVA Amendments Approved by SBA	Yes if JVA was originally approved for an 8(a) set-aside. Probably Not if JVA never required pre-approval in first place	No, unless amendment is an addendum to add an 8(a) contract
Time to Process the Applications	Two-stage review Depends on District Office that is processing application Generally takes several months	8-12 business days (if complete and accurate application) -- probably longer if applying in a secondary NAICS code or if firm has other MP relationships
Eligible to bid on 8(a) Set-Asides?	Yes	Yes, if protégé is an 8(a)



*Why would anyone still apply
to the 8(a) MPP?*



Multi-Small Joint Ventures

- Multi-Small = all members are individually below the applicable NAICS code size standard
- Old Rule:
 - All members in a multi-small jv had to be 8(a) firms, unless procurement was bundled or large
- New Rule:
 - Member need no longer be 8(a) firms
 - “A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract.” 13 CFR 121.103(h)(3)(i)
- What types of set-asides can a Multi-Small JV bid on?



Status Managed Joint Ventures (Multi-Small)

- Brand New
- Status Managed = managing member is a SDVOSB, WSOB, HUBZone, or 8(a)
- Other members need not have status – but must be individually small under relevant NAICS code
- No limit on number of members
- What types of set-asides can a Status Managed Multi-Small JV bid on?
 - Small business set-asides (same as multi-small basic rule)
 - Status-based set-asides if: (1) managing member has status, (2) all members are small, and (3) JVA complies with regulations
 - Additional regulatory compliance requirements if awarded a contract
 - Additional requirements if 8(a) set-aside



Status Managed Joint Ventures (Mentor-Protégé)

- Brand New
- Status Managed = Protégé is a SDVOSB, WSOB or HUBZone
 - Other member must be a Mentor under an SBA approved MPA with the Protégé
- Old Rule:
 - 8(a) MP JV could not bid on SDVOSB, WSOB or HUBZone set-aside unless both members had relevant status
- New Rule:
 - 8(a) or All Small MP JV can bid on SDVOSB, WSOB or HUBZone set-aside if Protégé has relevant status and is small



Joint Venture Agreements

- To receive exemption from affiliation, JVA must comply with specific regulatory requirements
 - Requirements differ by program
 - Process for amendments/addendums differs by program (some require SBA approval)
 - Some requirements are confusing, illogical, and problematic – easy to screw up
- If JV is competing for an 8(a) set-aside, JVA must be pre-approved by SBA
 - Pre-approval is no longer an assurance of compliance!
- Susceptible to size protest



Evaluation of Past Performance & Experience on Set-Asides

- Past Performance/Experience evaluation in source selection
- Old Rule
 - No requirement that source selection team consider past performance/experience of both mentor and protégé
 - In theory, source selection team could limit consideration to projects performed by joint venture itself
- New Rule
 - For all set-aside procurements, source selection team must consider past performance/experience of all members of the joint venture
 - “procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously.”



INTERACTIVE SESSION

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Practical Guidance

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Practical Tips – The Joint Venture Agreement

- Well-written Joint Venture Agreement is **CRITICAL!!!**
 - Affiliation exemption only applies if JVA meets regulatory requirements



Practical Tips – The Joint Venture Agreement

- JVA regulatory requirements differ by program
- Common requirements:
 - Protégé / Status-Holding member must be managing member of JV
 - Project manager must be employee of managing member
 - Managing member must own at least 51% of the JV (if JV is a separate legal entity)
 - Managing member must perform at least 40% of the work performed by the JV
 - Profits split in accordance with work-split
 - Each member ensures performance
 - Itemization of all major equipment, facilities, and other resources to be furnished by each party to the joint venture (limited exceptions where JVA is to compete for an IDIQ contract)
 - Specification of the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance (limited exceptions where JVA is to compete for an IDIQ contract)
 - Various accounting, record keeping and reporting requirements



Practical Tips – The Joint Venture Agreement

- Some regulatory requirements are confusing, illogical, and problematic – easy to screw up
 - Don't blow off the equipment/resources list requirement
- Compliance is subject to size protest (even if pre-approved by SBA)
- Process for amendments/addendums differs by program (some require SBA approval)
- If JV is competing for an 8(a) set-aside, JVA must be pre-approved by SBA
 - Seek pre-approval well in advance
 - BUT, pre-approval is no longer an assurance of compliance!
- Get an experience government contracts attorney to draft/review



Practical Tips – The Joint Venture Agreement

- Just checking the regulatory compliance boxes isn't enough
 - JVA is only way to protect your right
 - Particularly critical for the Mentor or Members with Minority-Ownership Interests
 - A MP or Multi-Small JVA should be just as detailed (if not more) as you would any other JVA
- Useful terms to include that are not required by regulation:
 - Include minimum work requirements for Mentor and Members with Minority-Ownership Interests
 - Peg loss/liability share to work share
 - Subcontracting control
 - Warranty of size/status
- Things to remember
 - Avoid unduly restricting operations
 - Some terms usually pegged to ownership percentage need to be pegged to work-share



Practical Tips – The Joint Venture Agreement

- Creating JV as a formal corporate entity (Corp., LLC, etc.) or as a partnership?
- Choosing how to manage the JV's affairs?
 - Management Committee?
 - Direct Member Management?
- What kind of decisions should be reserved for unanimous or super-majority consent?



Practical Tips – Three-in-Two Rule

- Automatic general affiliation between members of a JV, if JV is awarded 3 contracts in 2 years
 - Used to be more strict (submission of 3 proposals in 2 years)
 - Can even apply to MP JVs
- How to circumvent
 - 3 awards only count against single JV entity
 - Can create a new JV between same members to re-start the count
 - Ex) If XYZ – ABC JV has 3 contracts awards in 2 years, you can avoid 3-in-2 affiliation by created a new JV between XYZ and ABC before bidding for a 4th award



Practical Tips – Operations

- Project Manager
 - Needs to be employed by managing member
 - For MPs – at time of proposal, PM ...
 - Can be employed by a 3rd party – if letter of commitment
 - Can't be employed by mentor
- Take heed of the Limitations on Subcontracting rules
 - Not all work counts towards compliance calculation
 - Apply in conjunction with 40% min. managing member work-share rule
 - Plan work to meet work-share and LoS rules in every calculation period
 - Calculation period can vary
- Generally better to have Subcontracts run through JV, rather than JV members



Practical Tips – With Whom Should You Joint Venture?

- General tips
 - Don't joint venture with a company you've never worked with before.
- Mentor-Protégé Programs
 - Large Businesses: How to select the right protégé
 - Small Businesses: How to select the right mentor
- Multi-Small
 - When does it make sense to have 3+ firms in the joint venture?
 - How many members is too many?
 - Keep in mind new past performance rules – bad history of one member can taint entire team



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