# Small Business Joint Ventures

U.S. Small Business Administration
SBA
Your Small Business Resource

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# Joint Venture

- Joint venture is for a specific purpose
  - A single contract
  - Generally, ongoing entity going after multiple contracts is a partnership, not a JV

- All participants in the JV are prime contractors
- General Rule:  Participants in the JV are affiliated for that procurement.
- SBA will aggregate the receipts or number of employees of all the participants.  *See* 13 CFR 121.103(h)(2).

# Joint Venture

- Exceptions to aggregation requirement
- JV is small if each participant is small
  - "bundled"
  - Procurements above $10 million if the size standard is employee based
  - Procurements with a value in excess of half of a revenue based size standard

13 CFR 121.103(h)(3)(i)

# SBA's Definition

- A joint venture is 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.

13 CFR 121.103(h)

# SBA's Definition

- JV entity may receive up to 3 contract awards in a 2 year period
- Agreement must be in writing
- JV may be formal (separate entity) or informal (not a separate entity)
- If JV is separate legal entity (formal JV) it may be populated or unpopulated
- If JV is informal, it must be unpopulated
- Same participants can form another JV and pursue up to 3 more contract awards
  - Longstanding relationship between same partners will lead to finding of general affiliation

# SBA's Definition

- Once JV receives an award the clock starts ticking

- SBA is aware of the potential the JV may receive more than 3 awards if they had not yet received three awards as of the date they submitted several offers and happened to win more than one of the awards pertaining to those offers.

- JV must meet Limitations on Subcontracting (performance requirements) FAR 52.219-14; 13 CFR 125.6.

- For size purposes, a concern must include in its receipts its proportionate share of joint venture receipts, and in its total number of employees its proportionate share of joint venture employees. 13 CFR 121.103(h)(5).

# 8(a) Mentor-Protégé Program

- Mentor  can be a small or large business or nonprofit
- Mentor can have up to 3 protégés at one time
- Protégé can have second Mentor, corresponding to an unrelated, secondary NAICS code.
- SBA prohibited from approving a new Mentor-Protégé relationship within six months of the end of an 8(a) Participant's program term.

# 8(a) Mentor-Protégé Program

- Mentor-Protégé Agreement must be approved by SBA before the firms can submit an offer on a procurement as a small business; otherwise there is no exception to affiliation at time of offer. The JV with the Mentor must be approved prior to award.
- SBA approved Mentor-Protégé joint ventures are small for federal subcontracts.
- Benefits derived from the Mentor-Protégé relationship end once the Protégé leaves the program.

# SBA's Review of the Mentor-Protégé Relationship

- SBA's approval is based on whether or not non-disadvantaged firms unduly benefit from the program
- Analysis will consider:
  - if the assistance to be provided will promote developmental gains to the 8(a) firm,
  - if the developmental gains are tied to the approved business development plan,
  - whether there are issues of negative control, and
  - if the agreement is merely a mechanism to enable non-8(a) firms to receive 8(a) contracts.

# Mentor-Protégé Agreement

- Protégé may seek reconsideration of declined MPA.
- Failure on part of mentor to comply with the terms of the MPA may result in;
  - termination of the agreement
  - two year bar from participation as a mentor
  - Stop work order on the contract
  - Government wide suspension and debarment

# 8(a) Joint Ventures

- SBA will review all joint venture agreements for 8(a) set aside contract performance.
- An 8(a) Participant may joint venture with one or more other small businesses or its Mentor
  - Exception to affiliation in the Mentor-Protégé relationship
- Project Manager requirement:
  - <u>Unpopulated or Populated only with admin personnel</u>: employee of 8(a) managing venturer must be project manager
  - <u>Populated</u>: JV must demonstrate how performance is controlled by 8(a) managing venturer

# Joint Ventures

- Although SBA does not approve joint venture agreements for procurements outside the 8(a) program, if the size of a joint venture claiming an exception to affiliation is protested, the 8(a) JV requirements must be met in order for the exception to affiliation to apply.
- Section 124.513(d) references the *percentage of work requirements* of § 124.510 which include the percentage of work requirements set forth in § 125.6.

# Populated vs. Unpopulated

SBA will not require any joint venture to be populated

- Populated Joint Venture
  - Formed as a separate legal entity that has its own separate employees.
  - Joint ventures populated with individuals intended to perform any awarded contracts, the joint venture must demonstrate that the 8(a) Participant to the joint venture controls the joint venture, is responsible for the books and records of the joint venture, owns at least 51% of the joint venture, and receives profits commensurate with its ownership interest.

# Populated vs. Unpopulated

- Unpopulated (or populated only with administrative personnel)
  - Requirement that an 8(a) Participant must perform at least 40% of the work done by a joint venture
    - 40% replaces former “significant portion” language
  - Project Manager is an employee of the 8(a) Participant.

# 8(a) Joint Ventures

- For all 8(a) contracts (and all contracts with Mentor as JV partner), the JV agreement must comply with the 8(a) JV requirements.
  - Managed by 8(a) Participant
  - Profits commensurate with performance of work, or 51% of net profits to 8(a) if formal JV
  - Bank Accounts
  - Records held by 8(a) Participant
  - Total of 12 Requirements outlined at 13 CFR 124.513(c)

13 CFR 121.103(h)(3)(iii)

# 8(a) Joint Ventures

- For all contracts, (not just 8(a)), the Participant must meet the limitations on subcontracting requirements. *See* 13 CFR 121.103(h)(3)(iii).
  - 8(a) Participant must perform at least **40%** of the work performed by the JV (includes all work done by non-8(a) joint venture participant and any of its affiliates at **any** subcontracting **tier**)
    - Performance must be more than administrative functions
  - If Populated JV (with individuals intended to perform on contract), non-8(a) JV party and any of its affiliates, may **not** act as a subcontractor to the JV at any subcontracting tier unless approved by AA/BD
    - But JV must be 51% owned by 8(a) and 8(a) must receive 51% of profits

# 8(a) Joint Ventures

- For 8(a) contracts ONLY, SBA District Office must approve JV agreement prior to contract award. *See* 13 CFR 124.513(e).
- Once a JV has been established and approved by SBA for one 8(a) contract, a second or third 8(a) contract may be awarded to that joint venture if an addendum to the JVA is provided to and approved by SBA prior to contract award.

# 8(a) BD Program Reporting

- Annual Review :
  - Participant must demonstrate how it is meeting the performance of work requirements for each contract that it is performing as a JV.
- Contract:
  - At the completion of every contract awarded to a JV, the Participant must explain how the Performance of Work Requirements were met.

# SDVO Joint Ventures

- SDVO SBC must be the managing venturer
- Employee of SDVO SBC must be project manager
- SDVO SBC must get 51% of net profits
- JV agreement must set forth responsibilities with respect to performance
- *See* 13 CFR 125.15(b)

# SDVO Joint Ventures

- SDVO Firms can form separate entities under 13 CFR 121.103(h). *Construction Engineering Services*, LLC, SBA No. VET-213 (2011).

- SDVO SBC subcontractors may be used to meet limitations on subcontracting (performance requirements). 13 CFR 125.6(b).

# HUBZone JVs

- All JV participants must be HUBZone SBCs
- HUBZone subcontractors may be used to meet performance requirements. 13 CFR 125.6(c).
- Construction – performance requirement is 50% (prime must do 15% or 25%, as applicable)
- Non-manufacturer must supply the product of a HUBZone SBC (and no waivers)

# Women-Owned SB JVs

- The EDWOSB or WOSB participant must be designated on SAM and ORCA as an EDWOSB or WOSB
- Join venture agreement must be written
- JV Agreement must designate an EDWOSB or WOSB as the managing venturer of the joint venture
- An employee of the managing venturer  must be the project manager responsible for the performance of the contract.
- The JV must perform the applicable percentage of work requirements
  - Subcontractors do not count.
- The WOSB or EDWOSB must provide a copy of the joint venture agreement to the contracting officer and can do so through the WOSB Program Repository.

# Ostensible Subcontractor Rule

13 CFR 121.103(h)(4)

- A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes
- An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract or a subcontractor upon which the prime contractor is unusually reliant

# Ostensible Subcontractor Rule

- All aspects of the relationship are considered, such as contract management, technical responsibilities, percentage of subcontracted work, bonding, whether the subcontractor is the incumbent and is ineligible to submit its own offer
- A prime can be found to be affiliated with its subcontractor even where the prime will meet the applicable performance requirements (limitations on subcontracting)

# Thank You!

Questions?