

SUPPLY CHAIN SYMPOSIUM

Size Matters More Than Ever

How Large and Small Prime Contractors and Subcontractors Can Capitalize on Changes to Small Business Regulations

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Goals

- **Key Takeaways For Attendees**
 - Understand why small business contracting expands opportunities for all businesses
 - Learn about the requirements and approval process for the Small Business Administration's (SBA) All Small Mentor Protégé Program
 - Recognize the requirements, compliance standards, and affiliation exception for small business joint ventures
 - Understand how the new subcontracting limits are calculated
 - Review strategies for compliance

Agenda

I. Why Size Matters

- ❖ Changes in Regulatory Landscape in 2016

II. All Small Mentor Protégé Program

- ❖ Mentor and Protégé Eligibility, Requirements, and Limitations
- ❖ Joint Ventures
- ❖ Mentor Protégé Harmonization with Other Programs and Regulations

III. Subcontracting Limits

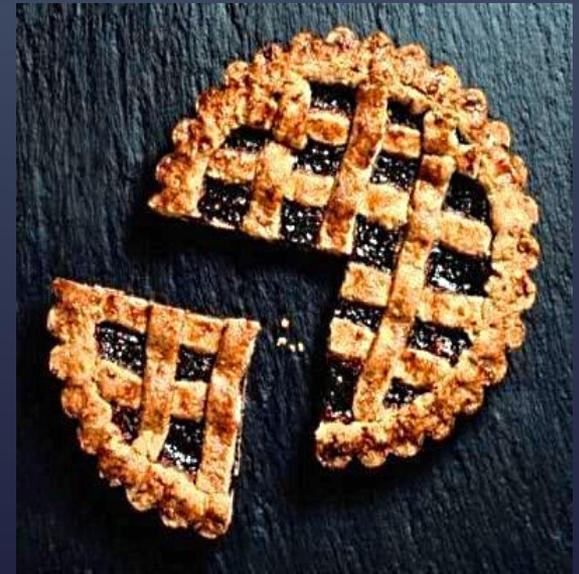
IV. Recommended Strategies for Contractors

I. WHY SIZE MATTERS

**SMALL BUSINESS CONTRACTING EXPANDS
OPPORTUNITIES FOR ALL**

Small Business Contracting Goals

- 15 U.S.C. § 644(g)(1): Government-wide goals for small business contracting
 - 23% of prime contracts for small businesses
 - 5% of prime and subcontracts for women-owned small businesses
 - 5% of prime and subcontracts for small disadvantaged businesses
 - 3% of prime and subcontracts for service-disabled veteran-owned small businesses
 - 3% of prime and subcontracts for HUBZone certified small businesses



Small Business Contracting Goals

- 15 U.S.C. § 644(g)(2): SBA and federal agencies establish individual small business goals that satisfy or exceed the government-wide goals.
- 24 individual agency goals:
https://www.sba.gov/sites/default/files/articles/FY2017_Final_Agency_Goals_Spreadsheet_20161201.pdf
- Both small and large business benefit from the Government's small business contracting requirements through mentor-protégé programs

2016: Changes to the Regulatory Landscape

- May 2016: Final Rule for Limitations on Subcontracting
 - Effective June 30, 2016
- July 2016: Final Rule for All Small Mentor Protégé Program
 - Effective August 25, 2016
- Expands opportunities for large and small business prime and subcontractors



II. ALL SMALL MENTOR PROTÉGÉ PROGRAM

Background

- Historically, the SBA had a well-established mentor protégé program for SBA 8(a) certified firms under 13 C.F.R. Part 124. The SBA did not have a mentor protégé program for other categories of small business concerns
- The Small Business Jobs Act of 2010 and FY 2013 National Defense Authorization Act authorized the SBA to establish government-wide mentor protégé program
 - Proposed Rule Issued: February 5, 2015
 - Final Rule Published: July 25, 2016
 - Effective Date: August 24, 2016 - Creates second “All Small” Mentor Protégé Program
 - Official Launch: October 1, 2016

Purpose and Establishment

- Purpose of Program: “Allow all small businesses to tap into the expertise and capital of larger firms, which in turn should help small business concerns become more knowledgeable, stable, and competitive in the Federal procurement arena”
 - Patterned on existing 8(a) Mentor Protégé Program
- The Final Rule established 13 C.F.R. § 125.8 (Joint Ventures) and 13 C.F.R. § 125.9 (All Small Mentor Protégé Program) and amended the SDVOSB (13 C.F.R. Part 125) , WOSB (13 C.F.R. Part 127), and HUBZone (13 C.F.R. Part 126) regulations to establish the All Small Mentor Protégé Program
 - The 8(a) regulations in 13 C.F.R. Part 124 were amended for consistency

Benefits of Mentor Protégé Program

Protégé

- Financial, marketing and proposal assistance
- Training
- Subcontracts
- Joint Ventures
- Bonding

Mentor

- Joint Ventures
- Exception from affiliation
- Set-aside contracts
- Small business allies in industry
- Public relations

Mentor Eligibility

- 13 C.F.R. § 125.9(b)
- Large or small business
- For-profit entity that demonstrates commitment and ability to assist small business concerns
 - Possesses good character
 - Not suspended or debarred
 - Can impart value to protégé
 - Demonstrates that it can satisfy the obligations identified in the mentor-protégé agreement
- Mentor must annually certify that continues to possess good character and favorable financial position
- Mentor can own up to 40% of protégé

Protégé Eligibility

- 13 C.F.R. § 125.9(c): open to all small businesses, regardless of program (e.g., WOSBs, VOSBs, SDVOSBs, HUBZone, small business)
- May self-certify as small under primary NAICS code and in need of mentoring, OR seeking assistance in secondary NAICS code if small
 - For a secondary NAICS approval, the protégé must demonstrate a “logical business progression”
 - SBA may examine protégé’s SDVOSB or WOSB self-certification
- 8(a) Protégés
 - Must show a positive impact on their business plan
 - Eliminated former 8(a) protégé eligibility requirements (i.e., half of the NAICS size standard, in the developmental phase, or never received an 8(a) contract)
 - 8(a) concerns that graduate from the 8(a) program can recertify as small and retain their mentor-protégé relationship

Limitations

- **Mentors**: Maximum of 3 protégés at any time under Mentor Protégé Program
 - Default for mentor is 1 protégé at a time
 - SBA may authorize a mentor to have additional protégés where the mentor can demonstrate that the additional relationship will not adversely affect the development of either protégé firm (e.g., protégés may not be competitors)
- **Protégés**: Default is 1 mentor; maximum of 2 mentors
 - SBA will approve a second mentor only if: second mentor relationship pertains to unrelated, secondary NAICS code OR protégé seeks to acquire specific expertise first mentor does not possess

Mentor Protégé Agreement: Contents

- 13 C.F.R. §125.9(e): the Mentor Protégé Agreement (MPA) must be a formal, written agreement
 - Detail the specific benefits and assistance to the protégé and the timeline for the delivery of assistance
 - Address how the assistance to be provided will help protégé meet its goals as defined in its business plan
 - Benefits must be real developmental gains
 - If applicable, identify how the assistance to be provided by the proposed mentor is different from assistance provided to the protégé through another MPA, either with same or different mentor

Mentor Protégé Agreement: Contents

- Point of Contact: agreement should establish a single point of contact in the mentor who is responsible for managing and implementing the agreement
- Term: minimum of 1 year; up to 3 years in one MPA, with a second 3-year term, for a total of 6 years
 - For existing 8(a) mentor protégés, time began running from August 24, 2016
- Termination: either party can terminate the MPA on 30-days' notice to other party and SBA

Mentor Protégé Agreement: Approval

- Approval: MPA must be approved by the SBA prior to receiving any program benefits
- Rejection: If SBA rejects an MPA, the protégé may file a request for reconsideration of MPA within 45 days under 13 C.F.R. § 125.9(f)
 - The mentor and protégé are able to revise MPA during reconsideration to provide additional information and documentation
- The SBA must issue reconsideration decision within 45 days. If the MPA is declined again, but for different reasons, protégé can submit a second reconsideration request
 - If SBA rejects MPA, proposed protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a 60 day period
 - Protégé can submit application with new mentor at any time

Mentor Protégé Agreement: Changes

- Certification: Protégé must annually certify to the SBA whether there were any change to the MPA terms.
- Amendments: any changes to the MPA must be in writing and approved by the SBA
 - If mentor and protégé fail to obtain SBA approval, SBA shall terminate MPA and can propose suspension/debarment
- Change in Ownership: MPA can continue even If mentor undergoes a change in ownership
 - The approved MPA may continue if mentor acknowledges the MPA in writing to the SBA and certifies continuation to abide by terms

Mentor Protégé Agreement: Evaluation

- Annual Review: SBA reviews the MPA annually and can terminate at any time
- Reporting: Under 13 C.F.R. § 125.9(g), within 30 days of its approval anniversary, protégé must report to SBA for the preceding year:
 - All technical and/or management assistance or loans and/or equity
 - All subcontracts awarded to and between the mentor and protégé,
 - All federal contracts awarded to the any mentor protégé joint ventures
 - Description of the assistance protégé has had in meeting developmental goals
 - Mentoring services it receives by category and hours
- Evaluation and approval: SBA reviews report and decide whether to approve continued relationship

Mentor Protégé Agreement: Consequences

- 13 C.F.R. § 125.9(h)
- If SBA determines the mentor is not providing its committed assistance, the SBA notifies the mentor and allows 30 days to respond
- If mentor fails to respond or fails to explain and provide a plan, SBA will:
 - Terminate the MPA
 - Mentor will be ineligible to serve for 2 years from termination
 - SBA may recommend that agencies issue a stop work orders to all mentor protégé joint venture contracts; where protégé can continue performance, protégé may be substituted as contract awardee
- The failure to provide the assistance in the MPA may be a basis for suspension or debarment



Application Process

- Apply online at www.certify.sba.gov
- All applicants must:
 - Register with SAM.gov
 - Execute and submit a Mentor-Protégé Agreement; a template is available at: <https://www.sba.gov/contracting/government-contracting-programs/all-small-mentor-protége-program/how-apply>
 - Complete online training module
 - Submit other documents to substantiate eligibility
- Timing: The Final Rule contemplated open and closed registration periods in the event that application volume was large
- Results: Industry has said processing time is less than a month with about 90-100 mentor-protégé relationship approved in the All Small Mentor Protégé Program

MENTOR PROTÉGÉ JOINT VENTURES



Why Joint Venture?

- Joint ventures are a significant benefit of mentor protégé relationship
 - Provides opportunity for large business to share up to 60% of revenues from set-aside contracts
 - Enables protégé to be a more competitive prime with resource, capabilities, and experience when mentor combined with protégé in evaluation
 - Agency must consider past performance of both joint venture partners
- 13 C.F.R. §125.9(d): Protégé may joint venture with its mentor for any government prime contract or subcontract, provided that the protégé qualifies as small for the size standard for NAICS code assigned to the procurement
- Joint venture will qualify for a set-aside contract for specific socio-economic programs, such as for SDVOSBs, WOSBs, HUBZone, if the protégé firm also meets the particular program-specific requirements

Affiliation Exceptions

- BROAD EXEMPTION FROM AFFILIATION under 13 C.F.R. § 121.103(h)(ii):mentors can joint venture with protégé can pursue set-aside contracts
 - Patterned on 8(a) exception from affiliation under 13 C.F.R. § 121.103(h)(iii)
- In order to qualify for exclusion from affiliation, joint venture must satisfy the joint venture content, performance of work, and certification requirements
- Additionally, under 13 C.F.R. § 121.103(h)(i), two or more business concerns may submit an offer as a small business for a federal procurement so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract
 - Revised previously complicated standard on May 31, 2016

Joint Venture Requirements

- Structure: the joint venture can be formal (established as corporation or LLC) or informal
 - If separate legal entity, the joint venture may not be populated with individuals to perform contract; administrative personnel are permitted
 - Protégé must own 51% of separate legal entity
 - SBA assumes informal joint ventures are unpopulated
- Name: Joint venture must do business in own name
- SAM Registration: Joint venture must be identified as such in SAM
 - Joint venture must have own CAGE and DUNS numbers
 - Entity type identified as joint venture and list individual joint partners
- Approval: No prior approval of JV agreement by SBA EXCEPT for 8(a) contracts

Joint Venture Agreement: Content Requirements

- The joint venture agreement must be in writing

13 C.F.R. § 125.8(b):

- Purpose of the joint venture
- Protégé must be the managing venturer of the joint venture
- Employee of protégé must be the project manager responsible for performance of the contract
 - Protégé can submit signed letter of intent for non-employee to become a protégé employee and project manager if protégé is the successful offeror
 - BUT: Project manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture

Joint Venture Agreement: Content Requirements (cont'd)

- If joint venture is separate legal entity, the protégé owns at least 51% of the joint venture
- Mentor and protégé must receive profits from the joint venture commensurate with the percentage of work performed
- Set-up of special bank account in joint venture's name
- Itemize all major equipment, facilities, and other resources to be furnished by each party
- Specify responsibilities regarding contract negotiations, source of labor, and contract performance between mentor and protégé

Joint Venture Agreement: Content Requirements (cont'd)

- Obligate joint venture parties to ensure and complete performance of set-aside contract despite withdrawal of the other member
- All joint venture accounting and administrative records must be retained in protégé's office
- Final original records be retained by protégé at completion of set-aside contract
- Quarterly financial statements submission to SBA no later than 45 days after operating quarter
- Project-end profit and loss statement submission to SBA no later than 90 days after completion

Joint Ventures: Performance of Work

- 13 C.F.R. §125.8(c)
- For set-asides, the joint venture must comply with the limitation on subcontracting in §125.6, and protégé must perform 40% of work performed by joint venture
- Protégé's work must be more than administrative or ministerial functions
- In calculating the respective work performed by the parties, the SBA will aggregate all work done by the mentor and any of its affiliates at any subcontracting tier

Joint Ventures: Compliance Certification

- 13 C.F.R. § 125.8 (d), (h)
- Initial certification: The mentor and protégé must certify to SBA and contracting officer prior to first set-aside contract:
 - the joint venture agreement's compliance with the content regulations;
 - the joint venture's compliance with the terms established in joint venture agreement; and
 - the joint venture's compliance with the performance of work requirements between the mentor and the protégé (which varies depending on the type of contract)
- Annual Reports: during performance and at contract completion, the protégé must report on how the joint venture complied with the performance of work requirements (signed by both parties)
- Requirement for ALL small business JVs including SDVOSB, 8(a), HUBZone, and WOSB

Consequences of Non-Compliance

- 13 C.F.R. § 125.8(i)
- Grounds for suspension or debarment:
 - Failure to enter into compliant joint venture agreement under §125.8(b)
 - Failure to perform contract in accordance with the joint venture agreement or performance of work requirements in § 125.8(c)
 - Failure to submit required certification or allow inspection of records
- 13 C.F.R. § 125.8(j) authorizes whistleblowers: Anyone with information on joint venture's compliance with performance of work requirements can report to SBA/SBA OIG



Harmonization with Other Programs and Regulations

Impact on Agency Mentor Protégé Programs

- Prior to Final Rule, there were numerous agency mentor protégé programs (DoD, VA, DHS, State, Treasury, GSA, NASA, etc.)
 - DoD mentor protégé program only agency to receive exemption
- 13 C.F.R. § 125.10: All other agencies may not have a mentor protégé program, unless agency submits plan and obtains SBA approval
- Agencies have a one-year window from August 2016 to submit existing agency mentor-protégé program for approval
- Approval based on whether program assists protégé to compete and complies with SBA mentor protégé program requirements
- Annual reporting to SBA on small business participants, assistance provided to them, and protégé progress in program

Harmonization with 8(a) Business Development Mentor Protégé Program

- As part of the Final Rule, SBA amended the 8(a) mentor protégé program (13 C.F.R. Part 124) to ensure consistency between programs
- Mentor Eligibility:
 - Instead of the 8(a) Program's "favorable financial health," mentor now must show capability of assisting protégé, tax return submission is optional
 - Non-profit mentor eligibility eliminated
- Protégé Eligibility
 - Small for the size standard for primary NAICS code or seeking business development assistance for secondary NAICS code, which also is small
 - Demonstrate how business development assistance advances business plan
 - Eliminated former 8(a) protégé requirements (i.e., half of the NAICS size standard, in the developmental phase, or never received an 8(a) contract)
- Harmonized limits on relationship with All Small Program; can be mentor and protégé
- Removed populated joint ventures

III. SUBCONTRACTING LIMITS

Background

- Proposed Rule Issued: December 29, 2014
- Final Rule Released: May 31, 2016
- Effective Date: June 30, 2016
- The Final Rule contained two significant changes:
 - Permits similarly situated subcontractors to satisfy the limitations on subcontracting requirements
 - Revises the calculation from amounts of labor costs to prices paid to non-similarly situated subcontractors

Similarly Situated Entities

- 13 CFR § 125.1: a “similarly situated entity” (SSE) is a subcontractor that has the same small business program status as the prime
 - An SSE must be small under the size standard assigned by the prime contractor to the subcontract, NOT the prime contract
- 13 CFR § 125.6(a): work performed by SSEs are treated as if it was performed by the prime
 - Any second-tier subcontracting by an SSE cannot be attributed to prime contractor’s share of the work (See 13 CFR §§ 125.6(a), (c), (e)(3))

Changes to Calculating the Limits on Subcontracting

- 13 C.F.R. § 125.6(a): The Final Rule changed the calculation from amounts of labor costs to prices paid to non-similarly situated subcontractors
 - Services (except construction): the prime contractor will not pay more than 50% of the amount paid by the government to the prime to firms that are not similarly situated
 - Supplies/products (other than from a nonmanufacturer of such supplies): the prime contractor will not pay more than 50% of the amount paid by the government to the prime to firms that are not similarly situated
 - Cost of materials are excluded and not considered to be subcontracted

Changes to Calculating the Limits on Subcontracting

- **General construction**: the prime contractor will not pay more than 85% of the amount paid by the government to the prime to firms that are not similarly situated
 - Any work that a similarly situated subcontractor further subcontracts cannot be attributed to the 15% for the prime contractor's share of the work
 - Cost of materials are excluded and not considered to be subcontracted
- **Special trade contractors**: no more than 75% of the amount paid by the government to the prime may be paid to firms that are not similarly situated
 - Any work that a similarly situated subcontractor further subcontracts cannot be attributed to the 25% for the prime contractor's share of the work
 - Cost of materials are excluded and not considered to be subcontracted

IV. Recommended Strategies for Contractors



Recommended Strategies

- Formation and approval of mentor protégé relationship
 1. Select a mentor protégé program: 8(a) or All Small
 - Compare and assess each program's benefits to your business, including the application process and timing
 - 8(a) lasts for 9 years, instead of 6 years
 - 8(a) currently takes longer to obtain approval, no electronic application
 2. Careful consideration of partner for Program
 - Be strategic in selecting a partner because the small business is in charge of all joint ventures. It is important to select partner that you have a strong relationship with and trust
 3. Review and understand the new Program and regulations to avoid mistakes in application submissions that result in delay to approval

Recommended Strategies



■ Joint Venture Agreement

- Prepare carefully and obtain legal review!
- Size protests for All Small and 8(a) will assess the joint venture's agreement and compliance of regulations
- OHA decisions will interpret joint venture requirements

■ Compliance Certification

- Business and legal consequences are significant for a faulty joint venture agreement
- Business: loss of awards/contracts
- Legal: risk of suspension and debarment, whistleblowers

Presenters



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Dick Oliver is a partner in the law firm's Government Contracts & Disputes practice and is located in the Los Angeles office. Mr. Oliver has more than thirty-five years of experience representing clients dealing with a wide range of government contract issues concerning the Department of Defense and the civilian agencies. In the course of his practice, he has frequently represented clients at the Government Accountability Office ("GAO"), the United States Court of Federal Claims ("COFC"), the Small Business Administration's ("SBA") Office of Hearings and Appeals ("OHA"), in state and federal courts, and before administrative boards of contract appeals, including the Armed Services Board of Contract Appeals ("ASBCA"). Mr. Oliver has also represented clients in major criminal and civil investigations.

Mr. Oliver has counseled clients, written professionally and lectured on the Federal Acquisition Regulation ("FAR"), small business rules, bid protests, service contracts, debarment and suspension, quality assurance, changes and claims, contract compliance, and subcontractor-prime contractor disputes. In response to the flurry of Executive Orders issued in 2014 and 2015, he has counseled numerous clients regarding various government contracts labor and socio-economic requirements, including the coverage and requirements of the Service Contract Act.

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As an associate in the Government Contracts and Disputes practice, she focuses her practice on bid protests, size protests, contract disputes and due diligence for mergers and acquisitions. Ms. Brady has represented clients before the Government Accountability Office, the Small Business Administration's Office of Hearings and Appeals and in state and federal courts. She also counsels government contractors on various regulatory requirements and compliance matters including, small business issues, Federal Supply Schedule requirements, country-of-origin issues and organizational conflicts of interest