TEAMING, JV's, MENTOR PROTÉGÉ & PROCUREMENT LAW UPDATE

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Teaming Agreement

Teaming Agreements are found at FAR Part 9

Basically they are a Prime/Subcontractor relationship

Issues generally encountered in a teaming agreement are:

1. Ostensible Subcontractor
2. Limitations on Subcontracting
3. The Agreement looking too much like a Joint Venture
   - E.G. Sharing of profits
   - Sharing of Management
   - Joint Decisions
   - Joint Checking Accounts
Under 13 CFR 125.1, a similarly situated entity is a subcontractor that has the same small business program status as the prime contractor. This means that for an 8(a) requirement, a subcontractor that is an 8(a) certified Program Participant. In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS Code that the prime contractor assigned to the subcontract that the subcontractor will perform.

The NDAA deems any work done by a similarly situated entity (for instance an 8(a) contractor is similarly situated to another 8(a) contractor) is not considered to be “subcontracted” for the limits on subcontracting, but may be counted towards the mandatory performance level for the small business concern acting as the prime contractor.

What that breaks down to is that similarly situated subcontractors or the respective subcontracts at the first tier only are not subcontractors in the traditional sense of the word and can be counted towards the prime’s mandatory performance levels on the contract.
Similarly Situated Entities

Caution: the work performed must be performed by the employees of the prime contractor or employees of the first tier similarly situated entity to count towards the mandatory performance requirements. If a first tier similarly situated entity subcontracts out work, that work will count as subcontracts performed by a non-similarly situated entity.

The SBA is not requiring a written agreement with a predetermined similarly situated entity. That plan was not in place for SDVO or HUBZone programs. The SBA was concerned about the administrative burden placed on small business concerns and the programs having different burdens placed upon them.

The SBA is not requiring mandatory performance limits be reported to the contracting officer as this was not necessarily authorized by the statute and the SBA did not and does not require it for SDVO or HUBZone Programs.
Similarly Situated Entities

The SBA clarified its proposed rule in that if a firm failed to meet its mandatory performance goals using similarly situated entities, the SBA could consider this as a basis for debarment, but the firm would have an opportunity to respond to any allegation with its own arguments and evidence.

Similarly Situated as it related to Architects and Engineers Contracts. Commenters to the rule were concerned that contracts awarded to an architecture firm having a size standard that is less than the size standard for engineering services would disqualify the engineering firm from performing. In response to these comments, the SBA is allowing prime contractors to assign NAICS Codes to the subcontracts. In this way, the SBA believes the approach will increase the ability of small business prime contractors to utilize similarly situated business entity subcontractors. In addition, this rule is consistent with the requirement that SBA rules require a prime contractor to assign the NAICS Code to a subcontract which describes the principal purpose of the subcontract. [13 CFR 125.3]
**Similarly Situated Entities**

**Fines and Penalties.** The SBA notes that the $500,000 dollar fine is the minimum amount (or the amount spent in excess of the permitted levels if greater) mirrors Section 1652 of the NDAA. The SBA believes this will deter contractors from agreeing to comply with limitations on subcontracting without a practical plan for compliance with applicable subcontracting limitations as well as passing on work to firms that the prime has adequately ensured is similarly situated.

**Exemption from Affiliation for Ostensible Subcontracting Rule.** This exemption applies to the relationship between the prime and a similarly situated entity. In short, the prime and similarly situated first tier sub will not be found affiliated based on the ostensible subcontractor rule (think primary/vital and/or unduly reliant roles).

**Who Counts the Revenue** The prime contractor will count the revenue (such as the revenue attributed to an 8(a) contract) when a similarly situated entity is used as a subcontractor and the prime contractor will not deduct the revenue amount subcontracted to that entity.
LIMITATIONS ON SUBCONTRACTING — NEW!

Comes under one rule 13 CFR 125.6

125.6(a) explains how to apply the limitations on subcontracting requirements to small business concerns contracts using based on the percentage of the award amount (not the cost to perform the contract) and that certain small business concerns may not expend on subcontracts more than a specified amount, dictated by the type of contract performed UNLESS the (non) subcontract goes to a similarly situated entity (as further explained below).

In short, if a similarly situated entity performs as a first tier subcontractor that performance may count towards the mandatory performance required by the contract. The performance by a similarly situated entity in those circumstances is not considered a subcontract that counts towards the limitation on subcontracting and against the mandatory performance level.

Limitation for services and supplies is statutorily set at 50% of the award amount.
LIMITATIONS ON SUBCONTRACTING

For contracts involving services and supplies, the SBA clarified that the contracting officer’s selection of the applicable NAICS Code will determine which limitation applies.

The exclusion for the cost of materials from supply, construction, and specialty trade construction procurements is included in this final rule for purposes of limitation on subcontracting.

For contracts that supply both services and supplies, the statutory authority authorizes that the limitations on subcontracts apply only to that portion of the requirement identified as the primary purpose of the contract.
Affiliation: Identity of Interest and Economic Dependence: 13 CFR 121.103(f) — New!

**Base:** Affiliation may arise when two or more persons or firms that have an identity of interest. Key words: identical or substantially identical business or economic interests (such as family members, common investments, economically dependent through contract or other relationship).

**Change: Type of Relationship**
The SBA narrowed the (familial) relationships for identity of interest to a seemingly more reasonable level. Now the *presumption* (presumption means its rebuttable) exists for firms that conduct business with each other that are owned and controlled by: (1) married couples; (2) parties to a civil union; (3) parents and children; and (4) siblings.
AFFILIATION: IDENTITY OF INTEREST AND ECONOMIC DEPENDENCE: 13 CFR 121.103(f)

Economic Dependence

If a firm derives 70% or more of its revenue from another firm over the previous fiscal year, SBA presumed and will presume that one firm is economically dependent on the other and likely find affiliation.

This presumption is also rebuttable and the SBA gave examples of some rebutting evidence and acknowledged that OHA used that 70% as guidance as well as allowing that 70% to be rebutted. For instance, if a start-up secures just two contracts then one contract may skew the revenue for that fiscal year.

Additionally, where the receipts from an alleged affiliate are not strong enough to sustain a firm’s business operations, and the firm is able to look to other financial support, such as some Alaska Native Corporations may have the ability to do, the fact that the firm received 70% of its receipts from an alleged affiliate may not be determinative.
In essence, the final rule specifies that the presumption of affiliation based on economic dependence may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern.

In addition, in regards to economic dependence, the SBA has clarified that it will not find affiliation between sister subsidiaries owned by the same Indian Tribe, ANC, Native Hawaiian Organization, or Community Development Corporation. (Recall, the final regulations in other spots seem to be harder on those organizations-this is not a blanket affiliation exemption.) Clue on this one is control and whether one firm has the ability to control the other; in this case, control financially through the 70% rebuttable rule.
DEFINITION OF JOINT VENTURE

Joint venture may be a formal or informal partnership or exist as a separate limited liability company or other separate legal entity.

However, regardless of form, the joint venture must be reduced to a written agreement.

If JV exists as a separate legal entity, it cannot be populated.

Separate legal entity joint venture may have its own separate employees to perform administrative functions, but not to have its own separate employees to perform contracts awarded to the joint venture.
**Joint Ventures**

A joint venture is an agreement by two or more entities to share in the management and performance of a project as members of an entity.

The entity can be a partnership, limited liability company or corporation.

Our firm favors the formation of an LLC to protect the parent firms without too much economic and financial stress.

A joint venture is always affiliated unless an exception exists.

A large business can only form a joint venture with a small business if they are in an SBA approved mentor protégé relationship.

Differences in JV and TA.
JOINT VENTURES AND EXCLUSION FROM AFFILIATION FOR SMALL BUSINESS CONCERNS

Current exclusion from affiliation based on mentor protégé relationship as long as the agreement is current and followed. That stands.

New exclusion: Broadens the exclusion and allows two or more small businesses to joint venture for any procurement without being affiliated with regard to the performance of *that procurement* requirement.

They both must be small under the NAICS Code for that procurement.
Recertification After Merger/Acquisition and During Procurement Process

Still stands that you must recertify size after merger/acquisition.

Added clarification with a paragraph, that states the SBA requires new small certification for pending contracts when the merger or acquisition occurs after offer but prior to award.
Tracking Awards to Joint Ventures

Some sort of joint venture identification is required.

Requires joint ventures to be separately identified in SAM so that awards to joint ventures can be properly accounted for.
8(a) BD Application Processing

Final Rule provides that IRS Form 4506T, Request for Copy or Transcript of Tax Form, is not needed in all cases.

SBA always has the right to request any applicant to submit specific information that may be needed in connection with a specific application.

Final Rule final rule amends § 124.202 to require applications to be filed electronically, with the understanding that certain supporting documentation may also be required under § 124.203.
**8(a) BD Application Processing**

Final Rule has **eliminated the requirement for a wet signature.**

As long as applicants know that the individual(s) upon whom eligibility is based take responsibility for the accuracy and truthfulness of any information submitted on behalf of the applicant, an electronic, uploaded signature should be sufficient.

If during the processing of an application, SBA receives adverse information regarding **possible criminal conduct** by the applicant or any of its principals, SBA’s current regs require SBA to **automatically suspend** further processing of the application and refer it to SBA’s OIG for review. **Final rule** provides necessary discretion to SBA to allow SBA to determine when to refer a matter to the OIG.
NEW MENTOR PROTÉGÉ RULE

- New Rules issued on July 25, 2016
- Grew out of two promulgations
  - The Small Business Jobs Act of 2010

Effect

- Expands the mentor-protégé program from only participants in the 8(a) Business Development Program to all small business concerns, while maintaining consistency as much as possible
STATED PURPOSE

The small business mentor-protégé program is designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms’ ability to successfully compete for federal contracts. This assistance may include technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts (either from the mentor to the protégé or from the protégé to the mentor); trade education; and/or assistance in performing prime contracts with the Government through joint venture arrangements. Mentors are encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities.
NEW REGULATION

13 CFR 125.9
ADVANTAGE TO MENTOR PROTÉGÉ - JV

Joint Venturing

- Major incentive to becoming a Mentor
- Provides a boost to small business in the following potential areas:
  - Past Performance
  - Capabilities
  - Responsibility
  - Bonding Capacity
  - Financial Capacity
  - Quality
OTHER INCENTIVES

Exemption from Affiliation

- During the mentor-protégé relationship, the protégé firm is shielded from a finding of affiliation where a large business mentor owns 40% of the protégé.
- This is the same as the 8(a) program, while inartfully stated in the release. What they are saying is that, like in the 8(a) program, the mentor and protégé are exempt from a finding of affiliation for complying for any of the terms and conditions of the mentor protégé agreement.

Why is this so important???

- M/P template
  - Is a template, not set in stone – a starting point
OTHER INCENTIVES, Cont.

Mentor Protégé Agreement, cont.

- Must be in writing
  - Just like any other agreement should be
- Back to the template
  - Careful crafting of the needs of the protégé (as well as the mentor) is critical to success
  - It is not wrong for the mentor to benefit
  - Keep your eye on the ball – Mentor the Protégé
  - Develop a business plan for the Protégé
OTHER INCENTIVES, Cont.

Mentor Protégé Agreement

- Depending on the status of the Protégé
  - Bid on any federal contract
    - Includes HUBZones
- Recent Case
  - EKCG, LLC, SBA No. VET-255 (2016)
    - Judge got the decision wrong
    - Said the joint venture with the mentor was not eligible to pursue a SDVO contract with the U.S. Department of Justice, Drug Enforcement Administration
    - The Judge determined that the SDVO rule that states all Parties to an SDVO JV must be small overrides the mentor protégé rule that says any federal contract
HOWEVER, the new regulation says:

... a joint venture between a small business protégé firm and its SBA-approved mentor will be deemed a small business concern for any Federal contract or subcontract for which the protégé qualified as small, but the joint venture will qualify for a contract reserved or set-aside for eligible 8(a) BD, HUBZone SBCs, SDVO SBCs, or WOSBs only if the protégé firm meets the particular program-specific requirements as well.

This clarification means that EKCG, LLC did qualify!
IMPORTANT INFORMATION ABOUT M/P

- Protégé is only Allowed to have One Mentor
  - Can have two if special conditions are met
- Mentor limited to no more than 3 Protégés
- Agreement is good for three (3) Years (can have a 3 year extension)
- Act authorizing the Program occurred in 2010
- The rule states that SBA’s new small business mentor-protégé program will become effective 30 days from July 25.
- If you have not done so, diversify your M/P program by having different kinds of Protégés.
- A M/P arrangement is like a marriage – easy to get into – hard to get out of
WHY BE IN A MENTOR PROTÉGÉ

Consider if you even want to be in a M/P relationship

- Consider the mutually exclusive reasons to play – again these are just Dave’s thoughts from experience
  - Make money – worst possible reason for a mentor
  - Expand footprint – Good
  - Expand capabilities – Good
  - Incubate a potential business line - novel
TAKE AWAYS — A LOT OF CHANGES

The M/P Program is now available to all small businesses

Small Businesses can JV for any procurement (both or all must be small)

Similarly Situated Entities

Limitations on Subcontracting Changes

Definition of “New” Construction clarified

Multiple changes to the Affiliation Rules
QUESTIONS?

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