SBA SMALL BUSINESS PROGRAM UPDATE

SOUTH FLORIDA
SAME
INDUSTRY DAY

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SIMILARLY SITUATED ENTITIES

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

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 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 121.1(f)

*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 it's 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.
AFFILIATION: IDENTITY OF INTEREST AND ECONOMIC DEPENDENCE: 13 CFR 121.103(f)

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.
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.
WHO MAY INITIATE A SIZE PROTEST A OFFEROR

Clarification that an offeror has standing if it is in line or in consideration for award (inside the competitive range).

There is no standing for the offeror that has been found to be non-responsive, technically unacceptable, or outside of the competitive range.

Rule also added the SDVO and WOSB/EDWOSB to programs in which the SBA’s Area Director, Officer of Government Contracting, can initiate a formal size determination, thereby matching other programs.
ADVERSE IMPACT AND CONSTRUCTION REQUIREMENTS

The SBA clarified when a procurement for construction services is new and when the SBA must conduct an adverse impact analysis for new requirements.

Currently, the SBA regulations states that “[c]onstruction contracts, by their very nature (e.g., the building of a specific structure) are considered new requirements.

However, recurring Indefinite Delivery or Indefinite Quantity ("ID/IQ") procurements/orders under IDIQs and similar contract vehicles for construction services are not considered new.

The SBA has found that some agencies have misinterpreted this regulation and considered these recurring IDIQ construction services new. The SBA now clarifies it for those agencies and others that this is not new.

Whether a construction contract is new is made on a case by case basis and there is now a process in place that allows the SBA to file an appeal with the procuring agency when there is a disagreement.
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.
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 PROCESS

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
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.
CHANGE IN PRIMARY INDUSTRY CLASSIFICATION

Since no current requirement that a newly admitted Participant actually perform most, or any, work in the six digit NAICS code selected as its primary business classification in its application, tribe/ANC/NHO/CDC could end up owning 2 (or more) firms actually operating in the same primary NAICS code.

Proposed rule allowed SBA to change the primary industry classification contained in a Participant’s business plan where the greatest portion of the Participant’s total revenues during a three–year period have evolved from one NAICS code to another.

- Revenues from primary code must exceed those from other code (not that they must exceed 50% of firm’s revenues).
CHANGE IN PRIMARY INDUSTRY CLASSIFICATION

SBA agrees with the commenters that SBA should not change a Participant’s primary NAICS code without discussion back and forth between SBA and the Participant.

- Where SBA believes that a Participant’s revenues for a secondary NAICS code exceed those of its identified primary NAICS code over the Participant’s last three completed fiscal years, SBA would notify the Participant of its belief and ask the firm for input as to what its primary NAICS code is.

- SBA would be looking for a reasonable explanation as to why the identified primary NAICS code should remain as the Participant’s primary NAICS code.

- The Participant should identify: all non-federal work that it has performed in its primary NAICS code; any efforts it has made to obtain contracts in the primary NAICS code; all contracts that it was awarded that it believes could have been classified under its primary NAICS code, but which a contracting officer assigned another reasonable NAICS code; and any other information that it believes has a bearing on why its primary NAICS code should not be changed despite performing more work in another NAICS code.
NEW MENTOR PROTÉGÉ RULES

- 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
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
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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