WORKING WITH UNCLE SAM: KEY CONSIDERATIONS FOR SMALL BUSINESSES



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This presentation is not intended to be legal advice.

If you have specific questions, please contact a
government contracts attorney.



Legal updates for government contractors.



Discussion summary

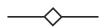
- Getting Started
- Small Business Programs
 - 8(a)/SDB
 - WOSB
 - SDVOSB/VOSB
 - HUBZone
- Strategic Partnerships
 - Prime/Sub Teams
 - Joint Ventures
 - Mentor/Protégé Programs

Business Size is a BIG Deal

- Small businesses play a vital role in federal contracting
 - Federal contract spending approaches \$1T each year
- Small Business Act
 - Sets goals for small business participation
 - \geq 23% of all prime contract awards to small businesses
 - Sole-source and set-aside opportunities.
- Socioeconomic program eligibility



Getting Started





Laws and Regulations

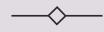
- -Federal Acquisition Regulations ("FAR")
- -Small Business Act
- -Davis-Bacon Act
- -Etc...



Registration

- -SAM.gov (Federal Registration)
- -Operating Agreements / Articles of Incorporation (State law)

Registration



Timing

- Don't wait. Lots of Paperwork
- EIN/TIN, DUNS, and SAM registration—before bidding
- If a joint venture, joint venture agreements must be approved to bid in some instances
 - If joint venture agreement doesn't comply, it does not get the benefit of the affiliation/size exception → might be sized out

INCREASING COMPETITIVENESS AS A SMALL BUSINESS





Small Business—Big Benefits

Socioeconomic program eligibility

- Firm must be small in its primary NAICS code to qualify for 8(a) Program, SDVOSB, WOSB, and HUBZone
- Continuing size requirements
 Set-aside/sole source contracts
- Must be small under solicitation's NAICS code
- General rule: if small at the time of bid submission, small for the entire contract

Importance of a Business's Size: Prime Contracts

Socioeconomic category	2023 %	2023 goal	2023 \$	2022 \$	% \$ Increase
Small business	28.35%	23.00%	\$178.6B	\$162.9B	9.63%
8(a)/SDB	12.1%	12.00%	\$76.2B	\$69.9B	9.01%
WOSB	4.91%	5.00%	\$30.9B	\$28.1B	9.96%
SDVOSB	5.07%	3.00%	\$31.9B	\$28.1B	13.52%
HUBZone	2.78%	3.00%	\$17.5B	\$16.3B	7.36%

Importance of a Business's Size: Subcontracting

Socioeconomic category	2023 %	2023 goal	2023 \$	2022 \$	% \$ Increase
Small business	31.08%	31.00%	\$86.4B	\$79.1B	9.22%
8(a)/SDB	4.89%	5.00%	\$12.7B	\$11.6B	9.48%
WOSB	5.65%	5.00%	\$14.7B	\$13.1B	12.21%
SDVOSB	2.63%	3.00%	\$6.8B	\$5.5B	23.64%
HUBZone	1.97%	3.00%	\$5.1B	\$4.3B	18.60%



Tip 1: Limit Competition

Obtaining socioeconomic program designations can help limit competitive pool

- Sole source
- Set-aside opportunities

Socioeconomic designations make valuable teaming targets

8(a) Business Development Program

51% owned and controlled by a socially and economically-disadvantaged person who is a United States citizen and is of good character

- Social: discrimination based on race, gender or other characteristics
- Economic: ability to compete has been impaired
 - Must demonstrate the ability to succeed
 - 13% prime contract goal
 - FY23: 5% (\$12.7 B)

8(a) Business Development Program

9-year program term (10, for some)

• Restrictions on former participants and family

Must maintain eligibility

- Economic disadvantage thresholds
 - Annual income: \$400k
 - Net worth: \$850k
 - FMV all assets: \$6.5m
- Minimize reliance on 8(a) awards
 - Non-8(a) business activity targets
- Annual reviews

Construction? Bona fide place of business

8(a) Business Development Program

Restricted competition

• Once 8(a), Always 8(a)

Sole-source contracts

- Individually-owned 8(a) companies
 - \$7.5m (manufacturing)
 - \$4.5m (all others)
- Entity-owned 8(a) companies
 - \$100m (DoD)
 - \$25m (all others)

Woman (U.S. citizen) owns at least 51% and unconditional controls small business

- Works at business full-time
- Holds highest officer position
- Highest compensated
- No more self-certification

5% prime contract goal

- FY23: 4.91% (\$30.9B)



Woman-Owned Small Business

51% owned and unconditionally controlled by SDV

- Works at business full-time
- Holds highest officer position
- Highest compensated
- SBA and VA have different programs
 - VA-specific program
 - Sole source authority
 - Required preference for SD/VOSB
- 1/1/2023: governmentwide verification
 - Run by SBA

5% prime contract goal (increase from 3%)

- FY23: 5.07% (\$31.9B)

Service-Disabled Veteran-Owned Small Business

HUBZone Program

- Small business
- At least 51% owned by U.S. citizen(s)
- Principal office in a HUBZone
- At least 35% of employees live in a HUBZone
- Annual recertification
 - Must recertify status within 30 days of anniversary date
 - Once recertified, eligible for contracts throughout the year
 - Status determined as of the date of bid
- Full reviews every three years

Principal Office

- Company's principal office must be located in a HUBZone
 - Location where the greatest number of employees work
 - Construction: cannot be a job site
- Long-term investment
 - If long-term lease (10+ years) or purchase, will be considered to be in a HUBZone for at least 10 years after certification date even if area is later redesignated
 - Does not apply to co-leased spaces



35% Employee Residency

- At least 35 % of employees must reside in a HUBZone
 - Reside: live full-time, for at least 180 days
 - Must attempt to maintain residency requirement during performance of any HUBZone contract
 - If less than 20%, firm has not attempted to maintain
- Employee: full-time, part-time, or other basis
 - Must work at least 40 hours during month prior to application/recertification
 - Must perform legitimate work for the company
 - Does not include bona fide independent contractors or subcontractors



Legacy Employees

- SBA allows companies to claim credit for employees who have moved
 - Must live in a HUBZone for at least 180 days after (re)certification
 - Employment must be continued and uninterrupted
 - Seasonal employees that are laid off likely don't count
 - Not eligible
 - Employees living in a redesignated area or qualified disaster area
 - Companies with principal office in a redesignated area or qualified disaster area
- Maintain detailed records!

Tip 2: Make Friends



Small businesses can augment their capabilities by working with other companies

- Teaming
- Joint Ventures



PRIME/SUB TEAMS

TEAMING

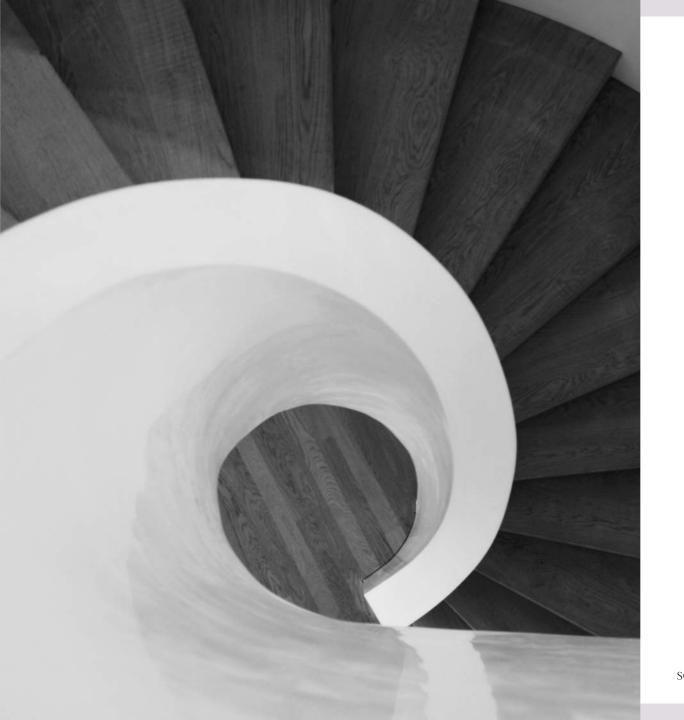
- •Prime Contractor/Subcontractor
 - •Only prime in "privity" with the Government
 - •No new legal entity created
 - •Subcontractor paid on a predetermined basis

- •Joint Ventures
 - New legal entity (split ownership)
 - •Only joint venture entity in "privity" with the Government
 - Venturers split profits and losses
 - •Workshare requirements for venturers

PRIME/SUB TEAMS



- Quintessential contracting relationship
 - Prime is awarded the contract, then subcontracts out a portion of that work to one or more subcontractors
 - Prime has privity of contract with the government, and is responsible/liable for performance of the contract
 - Prime/Sub Teams are ultimately governed under state law, but important principles apply



TEAMING AGREEMENT

- Agreement between the (prospective)
 prime and the (prospective) subcontractor
 to pursue a specific opportunity as a team
 - Entered before the prime contract and subcontracts are awarded
 - Lock in each party to the relationship
 - Define their roles on the team and their work in developing the proposal
 - Ensure compliance with requirements at the outset
- FAR does not specifically require TAs
 - Agencies/specific solicitations might require them



TEAMING AGREEMENT

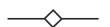
Potential TA terms

- Identification of parties and their roles
- Identification of solicitation/opportunity being pursued
- Division of responsibilities relating to proposal preparation
- Anticipated areas of performance under contract
 - Avoid illusory agreements
- Exclusivity, non-disclosure, and termination provisions
- Key subcontract provisions (limitation on subcontracting compliance, OCI/ethics, FAR flowdowns, etc.)

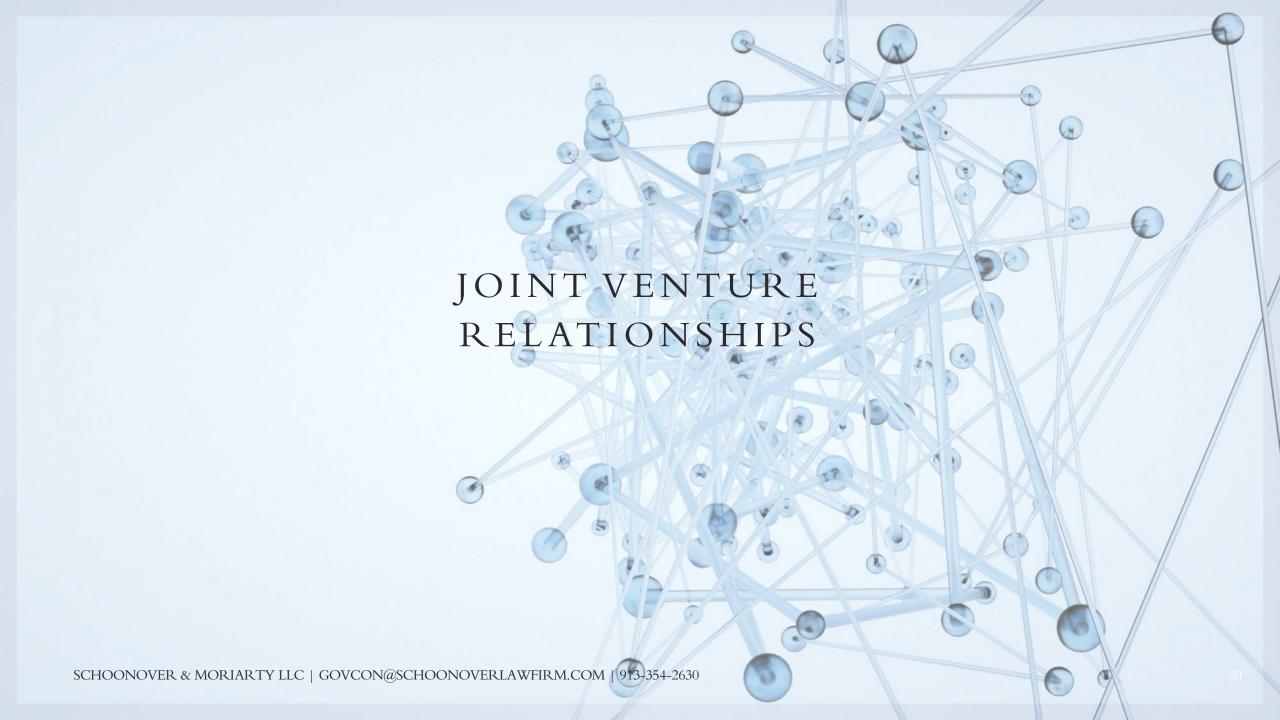
SUBCONTRACTS

- Awarded by the prime contractor to the subcontractor after the prime contract is awarded
 - Can be negotiated in advance
 - Replaces/supersedes the Teaming Agreement
- Detailed provisions relating to subcontractor performance
 - Scope of work
 - Deliverables/performance benchmarks
 - Payment provisions
- More common subcontract provisions
 - FAR flowdowns; ethics/OCI provisions
 - Limitation on subcontracting compliance
 - Non-disclosure, non-compete, and non-solicitation
 - Service Contract Act compliance
 - Changes (who/how authorized)
 - Dispute resolution (internal and external)
 - Termination (convenience and default)

SUBCONTRACTING CONSIDERATIONS

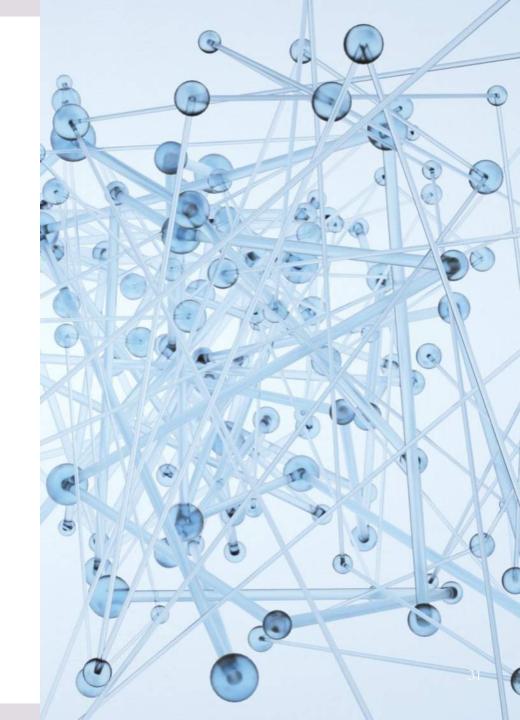


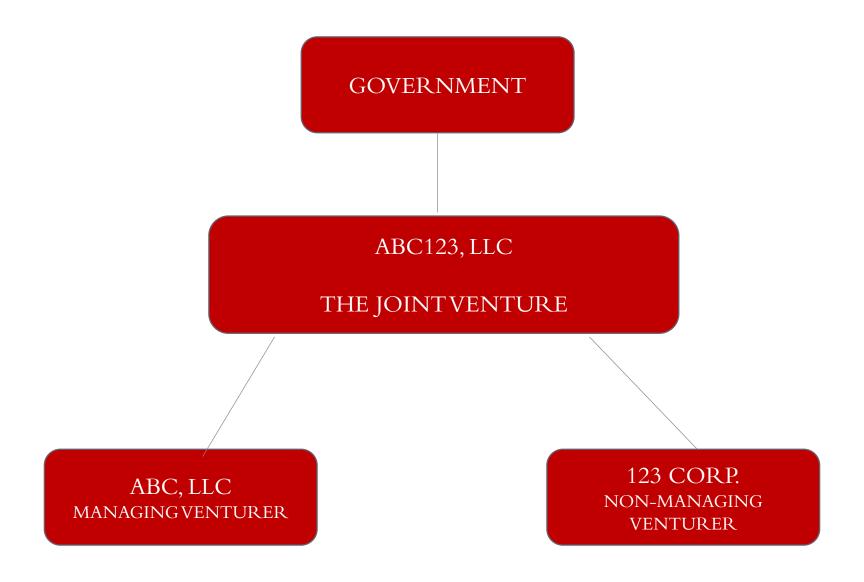
- Past performance
 - Relying on a teammate's past performance
 - Earning past performance
- Limitation on subcontracting
- Ostensible subcontractor affiliation
- Enforceability of teaming agreements and subcontracts



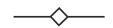
WHAT IS A JOINT VENTURE?

- •According to the SBA, a joint venture is a separate legal entity of limited purpose and duration.
- •Let's break that down...
- •"Separate legal entity"
 - •The joint venture is an independent businesses (e.g., corporation, LLC, LLP, etc.)
 - •The founding businesses are members/owners
- •Limited purpose
 - •Pursue specific federal contracting opportunities
- •Limited duration
 - •They are not ongoing concerns
 - •Spoiler Alert: The SBA's rules on duration are very strict





WHAT'S THE POINT?

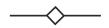


- In a word: collaboration.
- Joint ventures allow two small businesses to work together to pursue federal jobs that otherwise would have been out of reach.
- Practical support
 - The joint venture structure allows businesses to:
 - Pool resources
 - Diversify offerings
 - Take on larger projects
 - Avoid possible affiliation
 - Leverage security clearances
 - Share past performance

WHY ARE JOINT VENTURES HELPFUL?

- Preserve small business status
 - Compliant joint ventures receive an exception from affiliation
 - Exception only lasts two years
 - "Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award." 13 C.F.R. § 121.103(h).
 - Submitting a proposal more than 2 years after first contract award will result in affiliation of the joint venture members
 - Solution: Create a new joint venture.
- Provides alternative to subcontracting
 - Because they are separate legal entities, joint ventures have limitation on subcontracting advantages. (More on that later!)
- Legal mechanism for "co-prime" contractors
 - Joint ventures are a way for multiple companies to work at the prime contractor tier.

GREATER THAN THE SUM OF ITS PARTS

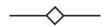


- Past performance
 - SBA's regulations require the agency to consider the past performance of the JV and its constituent members as part of the evaluation
 - Small business can now also rely on its performance as a JV member, to some extent
- Equipment, personnel and facilities
 - Ventures can pursue larger work as a duo with shared resources and experience
- Facility clearances
 - SBA regulations allow either the joint venture's clearance, or individual member clearances to satisfy security clearance requirements.

DRAWBACKS AND PITFALLS

- Timing
 - Lots of Paperwork
 - SAM.gov registration
 - In some instances, joint venture agreement must be approved to bid
 - Non-compliant joint venture agreement
 - SBA's regulations have detailed requirements
 - If joint venture agreement doesn't comply, it does not get the benefit of the affiliation/size exception
- Performance requirements

PERFORMANCE REQUIREMENTS



•Limitation on subcontracting

- •Applies to virtually all small business set-aside contracts
- •Limits the amount of a project that may be subcontracted
 - •Measured as percentage of total dollars paid by the government
 - •Different limits for different industries

•Performance work requirement

- •Applies only to small business joint ventures
- •The managing venturer must perform at least 40% of the work performed by the joint venture



JOINT VENTURE AGREEMENTS



- •All joint ventures must have a written agreement
 - •Must comply with applicable regulations
 - •Have JVA in place before bid is submitted
- •JV agreements must contain contract-specific provisions
 - •Create addendum for each contract the JV will bid on

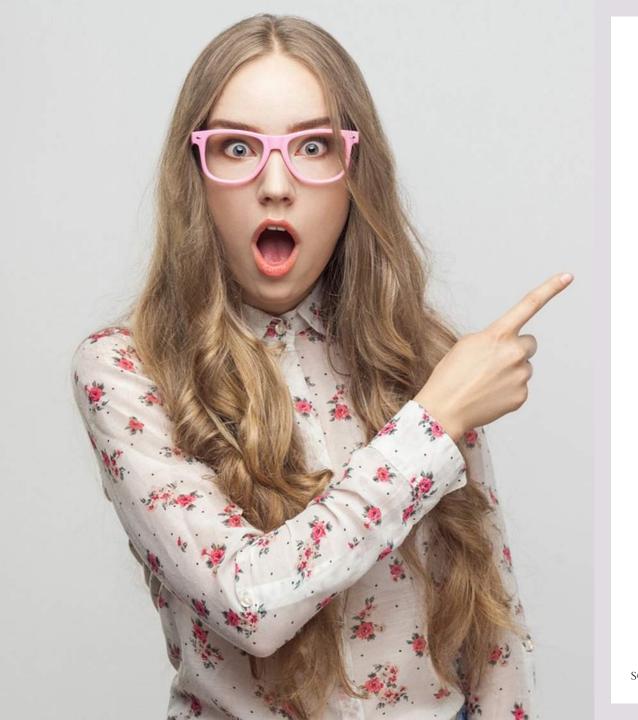


"UNIVERSAL" JOINT VENTURE AGREEMENT REQUIREMENTS

- 8(a)/SDVOSB/WOSB/HUBZone/protégé must own 51%
- 8(a)/SDVOSB/WOSB/HUBZone/protégé = managing venturer
 - Responsible for the day-to-day management and administration
 - Partners may participate in decisions "as is commercially customary"
- Employee of the 8(a)/SDVOSB/WOSB/HUBZone/protégé = Responsible Manager
 - Has the "ultimate responsibility for performance of the contract"
 - Need not be a current employee when offer submitted if letter of intent
 - Cannot be an employee of the mentor
- (8)(a)/SDVOSB/WOSB/HUBZone/protégé must receive profits commensurate with work performed OR a higher percentage agreed to by the parties

"UNIVERSAL" JOINT VENTURE AGREEMENT REQUIREMENTS

- Purpose what is the joint venture designed to do?
- Bank account requiring the signature or consent of all parties for payments to venturers for work performed
- Îtemized list with value of major equipment, facilities, and resources
- Responsibilities of the parties
 - Negotiation of the contract
 - Source of labor
 - Contract performance including how they will meet the performance of work requirements
- Obligating all members to perform
- Records
 - Accounting and administrative records kept at the MV office
 - Final original records retained by the MV
 - Quarterly financial statements to SBA within 45 days
 - Project end profit and loss statement to SBA within 90 days
- Certification of compliance



Tip 3:

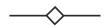
Make A Friend . . . With Benefits

Small businesses can augment capabilities through a mentor/protégé relationship

- SBA: governmentwide MPA
- Agencies have their own programs

SMALL BUSINESS ADMINISTRATION'S MENTOR-PROTÉGÉ PROGRAM

MENTOR-PROTÉGÉ PROGRAM



Overview

- Mentor-Protégé Program is a way for one business (large or small) to provide small business developmental assistance
- Improve the protégé's ability to compete for federal government contracts
- Open to all small businesses

Administration

- 8(a) "rolled into" ASMPP \rightarrow MPP
- The SBA administers the Mentor-Protégé Program

Application

- Applicants must develop a mentor-protégé agreement and submit it to the SBA for approval.
 - Agreement details developmental assistance items



ELIGIBILITY

Protégés

- Must be organized for profit
- Must qualify as small in its primary NAICS code (or identify a secondary NAICS code that it is seeking to develop)

For a secondary NAICS code, must have some preexisting capabilities and experience

Affiliation rules apply

• Not required to have a particular socio-economic designation

Mentors

- Must be organized for profit
- Must demonstrate that it can provide the assistance set forth in the mentor-protégé agreement
- Possesses good character
- Not debarred or suspended federal contractor
- Can impart knowledge through experience or knowledge of general business operations

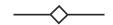
MENTOR-PROTÉGÉ DURATION

Relationship lasts for up to six years

SBA reviews the relationship annually

- Unless rescinded in writing, it's automatically renewed
- During the 30 days prior to annual anniversary, protégé must report: technical/management assistance; loans or investments made by mentor; subcontracts between the two; federal contracts awarded to the pair as a joint venture; narrative describing the success of assistance provided by mentor; mentoring services by category and hours

MENTOR-PROTÉGÉ LIMITATIONS



Protégé can usually only have one mentor at a time

- Protégé can have a second simultaneous one if it doesn't conflict with the first (*e.g.*, a second NAICS code or protégé wants expertise that the first mentor doesn't have)
- · Protégé can only have two mentors during its lifetime

Mentors usually have one protégé at a time, but can have up to three

- Additional relationships can't prejudice the others
- No lifetime max

A firm can be a protégé and mentor at the same time, if there's no conflict (e.g., different NAICS codes)



MENTOR-PROTÉGÉ AGREEMENT

Form of agreement is largely dictated by SBA

Core of agreement is listing:

- Protégé's needs
- Assistance that mentor will provide to meet those needs
- Timeline for providing identified assistance
- Metrics: how will the parties determine that the assistance has been successfully given

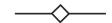
Specificity and details are key in this section

THEREFORE, consistent with the Parties' goals and the requirements of the SBA Mentor-Protégé Program, the Parties agree to the following:

- Identify the type(s) of assistance the Protégé is seeking from the Mentor. There are six categories to choose from, and you may select any or all that apply to your situation.
 - A. Management and Technical Assistance -This type of assistance might include help with internal business processes and management systems.
 - B. Financial Assistance This type of assistance might take the form of equity investments, loans or bonding.
 - C. Contracting This type of assistance might include navigating the contracting process, understanding your obligations as a government contractor, or developing your capability to compete for government contracts.
 - D. International Trade Education This type of assistance might include learning how to export, developing an international business plan, or identifying which international markets are right for your business.
 - E. Business Development This type of assistance might include help with strategic planning, identifying potential new markets for your business, or finding new contracting and partnership opportunities.
 - F. General Administrative This type of assistance might include help with general business processes, or other administrative support.

For each of the assessed needs addressed in the paragraph above, the Protégé must describe in detail: <u>WHAT</u> specifically will the mentor do to meet your need, <u>WHEN</u> (detailed timelines or number of hours in annual increments) the assistance will be provided, and <u>HOW</u> you will measure whether each of your needs have been successfully met and <u>HOW</u> the assistance will help the protégé enhance its growth and/or foster or acquire needed capabilities, as per 13 C.F.R. §125.9.

MENTOR-PROTÉGÉ ADVANTAGES



Small business development

• The mentor responsible for providing the assistance items with the mentorprotégé agreement

Affiliation exceptions

• A mentor and protégé will not be affiliated for engaging in the SBA approve assistance items.

Equity investment

• Mentor can make 40% equity investment to provide capital for protégé

Mentor-protégé joint venture

• A compliant mentor-protégé joint venture will qualify for *any* small business set-asides that the protégé member qualifies.

Regardless of the mentor firm's size!



MENTOR-PROTÉGÉ JOINT VENTURES

Mentor-protégé relationship does not establish an automatic joint venture

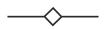
Mentor-protégé joint venture must still abide by:

- Joint venture work share requirements
- Applicable limitation on subcontracting

SBA must approve the mentor-protégé agreement before the joint venture can submit an offer for a federal government contract

• Otherwise, SBA may find the venturers affiliated

IMPORTANT CONSIDERATIONS



• Protégé

This is a great opportunity to learn from a seasoned company Ensure compatibility

- Limited to two mentors in a lifetime
- Might try subcontracting with the company before beginning the mentor-protégé relationship

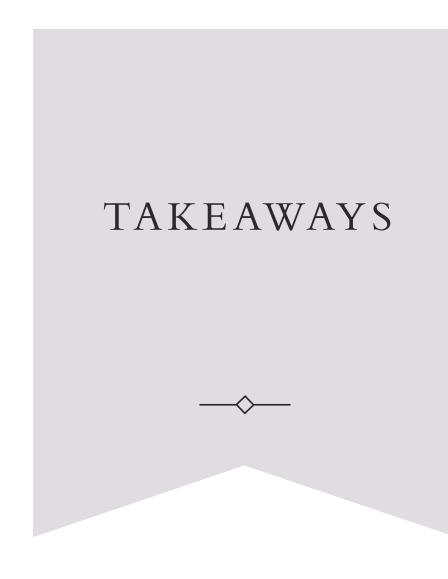
• Mentors

Opportunity to assess its own abilities and areas for improvement

Chance to make investments in younger companies

• Don't treat the relationship merely as an avenue for joint venturing





- Mentor-protégé program offer significant benefits
 - Small, unestablished businesses can receive significant mentoring from established and experienced businesses.
 - The program offers affiliation protection, joint venturing possibilities, and capital raising opportunities.
- Joint ventures are a powerful tool
 - Allow two small businesses, or a mentor and its protégé to collaborate to target larger projects.
 - Provide affiliation exceptions and limitation on subcontracting compliance advantages
 - Must have compliant JVA in place at time bid is submitted!
- Prime/subcontractor teams
 - Allows firms to customized solution for each procurement.

Thank you!

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