

# SBA'S 2016 JOINT VENTURE RULES AND ALL-SMALL MENTOR-PROTÉGÉ PROGRAM REVISITED

Presented By:

Hopewell Darneille  
Jackson Kelly PLLC  
Washington, DC  
(202) 262-5285



Melissa S. Loder  
Business Opportunity Specialist  
SBA West Virginia District Office  
(304) 623-7448

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# SBA's 2016 Regulations

- Final Rule, eff. 6/30/16 (81 FR 34243 (5/31/16))
  - Limitations on Subcontracting (LOS)
  - Joint Ventures
  - Affiliation
- Final Rule, eff. 8/24/16 (81 FR 48658 (7/25/16))
  - All-Small Mentor/Protégé Program
  - Joint Ventures





# Purposes of Changes

- Implement statutory requirements & authorizations
- Expand business opportunities for SBCs
- Provide SBCs more flexibility in structuring teams
- Simplify processes
- Provide clarification and certainty
- Enhance compliance and tracking

# Fundamentals to Keep in Mind



Small Business Size

Socioeconomic Status

Limitations on Subcontracting (LOS)

Small Business Goaling

# Are You Small?



## SBA Small Business Size Standards (13 CFR Part 121)

- Driven by NAICS Codes (Challengeable)
- Average Annual Receipts (AAR) or Employees
- Ongoing SBA review, changes

## Affiliation

- Ownership; Management; Identity of Interests; Newly-Organized Concern; Franchise/License Agreements
- Joint Ventures; “Ostensible Subcontractor” Rule
- “Totality of the Circumstances”

## Effective Size Determination Date

## Size Protests – SBA; VA VetsFirst





# Size Standards Increases

## Ongoing SBA NAICS Sector Size Standards Review

### Monetary Size Standards Inflation Adjustment

- Approximate 8.73% increase, rounded to nearest \$500k, effective 07/14/14; Added 8,500 SBCs

### Employee-Based Size Standards Increased

- NAICS Sectors 31-33, Manufacturing; NAICS Sectors 42 (Wholesale Trade) & 44-45 (Retail Trade)
- Other employee-based size standards

### Small Is Getting Bigger – Competitive Implications



# Socio-Economic Status

## Certification Programs

- SBA 8(a); HUBZone
- VA VOSB/SDVOSB – CVE (3-yr base period)

## Self-Certification

- WOSBs/EDWOSBs (note pending changes)
- Non-VA SDVOSBs

## Status Protests

# Limitations on Subcontracting (LOS)

## Changes

- Use contract value (excl. materials for supplies, construction)
- Exclude amounts subcontracted at any tier to small ***Similarly Situated Entities*** (SSEs) under applicable NAICS
  - But include amounts further subcontracted to non-SSEs
  - Requires reporting and tracking of subcontract work
- New offeror certification, contractor reporting and contracting agency monitoring requirements





# LOS Changes (Continued)

## SB Prime & Any SSEs Must Perform -

- Supplies/Products: > 50% of contract pymts (excl. material)
- Services: > 50% of contract pymts
- Construction: > 15% of contract pymts (excl. material)
- Specialty Construction: > 25% of contract pymts (excl. material)

13 C.F.R. § 125.6



# Small Business Goaling

- Statutory Goals (Not Mandates)
  - Small Business - 23%
  - SDBs (Incl. 8(a)) - 5%
  - WOSBs - 5%
  - SDVOSBs - 3%
  - HUBZone SBCs - 3%
- Agency Specific Goals
- Prime Contracts; Subcontracts



# Joint Ventures

# Four Basic Strategies

1. Bid by Yourself
2. Team with Others to Bid
3. Bid as Prime w/Subcontractors
4. Form a Joint Venture to Bid



# Joint Ventures (JVs)

## SBA JV definition – 13 C.F.R. 121.103(h)

- Specific or limited purpose business venture
- Single JV may receive up to 3 contracts in 2 years
- 2<sup>nd</sup>, and even 3<sup>rd</sup>, JV possible, but increases affiliation risk

Affiliation – except (historically): if bundled; >50% of size; 8(a) JV for 8(a) competitive; or 8(a) M/P JV)



# SBA 2016 JV Rule Changes

- Affiliation Rule Changed – Any SBC may JV with one or more other SBCs
  - Incl. 8(a), WOSB, SDVOSB & HUBZone SBCs
  - JV is small so long as each member is small u/applic. size std.
  - Logic – LOS/SSE Rules
- JV may still be informal (partnership) or formal separately organized entity (LLC; corp.)
  - However, formal JV now must be unpopulated (exc. poss. admin. pers.)

# SBA 2016 JV Rule Changes (Continued)



- Essentially uniform requirements apply to all set-aside programs
- Program eligible SBCs must be lead/managing partner, provide PM, and perform at least 40% of the JV work
- JVA must be in writing and contain specific common regulatory compliance elements
  - No prior SBA approval required except 8(a)

# SBA 2016 JV Rule Changes (Continued)



- JV must certify compliance with JV, Perf. of Work & LOS rules at contract start, after each performance year & upon completion
- Agencies must evaluate past performance and experience of JV members
- JV must separately register @ [www.SAM.gov](http://www.SAM.gov) w/sep. DUNS & CAGE numbers and identify entity as a JV and list indiv. JV members





# JV Advantages

- Enhance performance capabilities
  - Substantive expertise; geographic scope
  - Ensure JVA & proposal clearly demonstrate such enhanced experience & past performance
- Enhance offeror credibility
  - Detail any past experience working together
- Contract revenues apportionment for future size purposes
- Spread risk & costs



# JV Disadvantages

- Loss of sole control
- Dependence on others
- Personality/Culture Compatibilities
- Joint & Several Liability

Keep in mind, successful awards are likely to be long-term commitments



# What Makes a Good “Partner”

- Honesty
- Compatibility
- Customer intimacy
- Ability to market aggressively...know what you bring and market to both prime and federal agency
- Ability to shape or influence
- Demonstrated experience and past performance
- Complementary skills and “Value Added” Capabilities
- Niche capabilities
- Competitive Pricing
- Financial Stability
- Proven Track Record and References
- Quality Processes



# JV – A Commercial Entity

- JV, whether formal or informal, is a commercial entity
  - Parties' rights are governed by local law
- JVA must include all standard commercial terms governing parties' relations, as distinct from federal regulatory compliance
- Beware using form documents that fail to address critical issues.
  - Anticipate problems; protect yourself



# JVA – Regulatory Rqmts

SBA Regs specify minimum JVA contents

- No SBA Hdqtrs-approved JVA template

## SBA-Required Contents:

- 1) Purpose: state the purposes of the JV
- 2) Management: Identify Managing Member & PM
  - MM must be set-aside program qualified
  - PM must be MM employee (or ltr of intent)
- 3) Ownership: Qualified SBCs must own at least 51% of sep legal entity JV



# JVA – Reg. Rqmts (continued)

- 4) Profit Sharing: Qual. SBCs must rcv. profits commens. with work performed
- 5) Bank Acct – JV name; All rcpts; All expenses
- 6) Contributions: Itemize, value, all major equip., other resources
- 7) Responsibilities: Negot. authority; labor sources; perf., incl. how meet Perf. of Work rqmts



# JVA – Reg. Rqmts - continued

- 8) Perf. Continuity: Recognize perf. obligations, notwithstanding poss. Member(s) wdw
- 9) Acctg/Admin. Records: Qual. SBC ofcs
- 10) Orig. Records Ret.: Qual. SBC
- 11) Quarterly Fincls: Submit to SBA nlt 45 days after end of each quarter
- 12) Final P&L Statement: to SBA nlt 90 days after contract completion



# JVA – Other Reg. Requirements

- Perf. of Work – JV must perf. at least LOS Prime contractor work level
  - Perf. of Work Reports – ann. & upon completion to both cognizant Contracting Officer and SBA
- Contract award in JV name
- JV Records avail. for SBA inspection at all times, w/o notice (notice usually prov.; normal work hours)
- Suspension & Debarment
  - Willful violation of any reg. provision or rqmt, incl. non-compliant JVA, or failing to perf. JV or work perf. rqmts, comply with certs, or make records available





# JVA – Other Reg. Rqmts (continued)

- Be specific – partic. as to #s 6 & 7
  - OHA decisions rejecting non-specific JVAs
- Ensure proposals match JVA
- Note Regs focus is primarily vis-à-vis SBA
  - Also need to address members' relationships – e.g., access to records, bank account & reports



# JVA – Other Issues

- Monetary – invoicing; payment timing
- Recordkeeping responsibilities
- Records, bank account, reports access
- Compliance & Disclosure
- Risk Allocation
- Warranties & Indemnification
- Confidentiality
- Choice of Law, Venue
- Disputes Resolution, Costs Allocation



# SBA's New All-Small Mentor-Protégé Program (excluding DOD)

# SBA's New “Universal” Mentor-Protégé Program



## New Government-wide M/P program for all SBCs

- Parallel to, but separate from, current 8(a) M/P Program
- Excludes DOD; Other programs to be shut-down absent SBA leave
- Other agencies may continue eval. incentives for M/Ps

## Written MPA required; must establish benefits to SBC

- Contents per pre-existing 8(a) MPA rqmts; see SBA template
- SBA must approve MPA before proposal submission
- Max. 6 yrs – 3 yrs init., with 3-yr extension option, subj. to SBA

Annual review; SBA may terminate if insuffic. benefits to SBC  
or non-compliance with MPA or SBA Regs



# M/P Benefits

- Mentor may provide fncl, tech. and/or mgmt assistance, as detailed in MPA
  - Broadly define same in MPA
- M/P JV can compete for any prime/sub opportunity for which Protégé is eligible (not licensed across other S/A programs)
- No affiliation based on MPA; but possibly on other grounds
- Subcontracting both ways, subject to Performance of Work requirements
- Mentor may invest in & own up to 40% of Protégé



# Mentor/Protégé Eligibility

## Mentor

- Any for-profit business (non-profits excluded)
- Good character; strong finances; able to impart value
- Generally 1 Protégé, but possibly up to 3 based on capability

## Protégé:

- Must be small under primary NAICS Code
  - Or secondary NAICS Code **if** demonstrate prior experience & logical business progression in that NAICS Code
- Generally 1, but possibly 2, mentor(s) (different NAICS Codes, capabilities)
- May be both a Protégé and Mentor at the same time



# Universal Mentor/Protégé - Other

- MPA should include all appropriate commercial terms, in addition to SBA-required terms
- Parties must commit to one year – after which either may terminate on 30 days' notice, and SBA may terminate at any time if terms not being met or benefits conferred
- Protégé can only have total of two M/P relationships
  - Protégé therefore needs to choose Mentor wisely
- Mentor, in contrast, can have up to 3 Protégés at any one time



# Mentor/Protégé Applications

- SBA is accepting applications online at [www.certify.sba.gov](http://www.certify.sba.gov)
- See SBA's application guidelines & requirements online at [www.sba.gov](http://www.sba.gov)
- Follow steps & submit all required documents
- Applications reportedly are currently being processed promptly



# Thanks for Your Time



## Contacts:

Hopewell Darneille

(202) 262-5285

[hhdarneille@jacksonkelly.com](mailto:hhdarneille@jacksonkelly.com)

Melissa Loder

Business Opportunity Specialist

SBA West Virginia District Office

(304) 623-7448

[Melissa.Loder@sba.gov](mailto:Melissa.Loder@sba.gov)