



Society of
SAME
American Military Engineers



JOINT INDUSTRY DAYS AND FEDERAL AGENCY FORUM

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LEGAL UPDATE

Presented by:

David Rose

Principal Attorney



We Build Our Relationships ... One Client at a Time

www.roseconsultingllc.org

678-854-0222



SIMILARLY SITUATED ENTITIES



Under 13 CFR 125.1, a similarly situated entity is a subcontractor that has the same 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 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)

- **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.



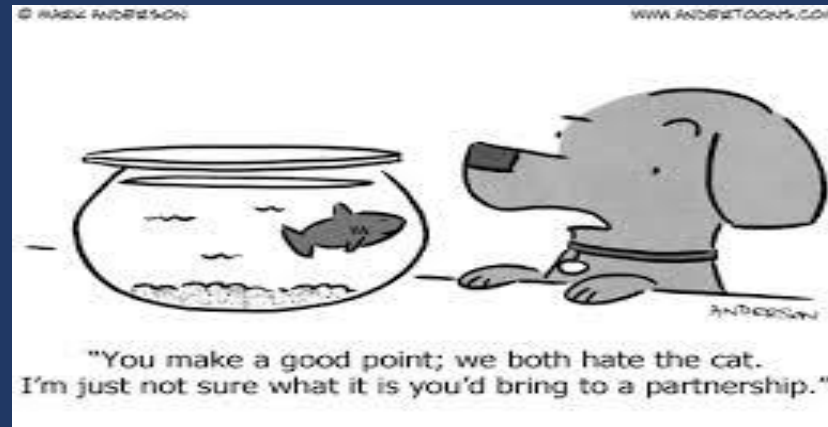
AFFILIATION: IDENTITY OF INTEREST AND ECONOMIC DEPENDENCE: 13 CFR 121.103(f)

- 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 AS AN 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.
- In France, their Constitution gives them the right to protest – Trivia!!



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.



DEFINITION OF JOINT VENTURE

- Several commenters disagreed: a populated joint venture has its own lower indirect costs, making the company more competitive and reducing the cost to the Govt.
- SBA continues to believe that a small protégé firm does not adequately enhance its expertise or ability to perform larger and more complex contracts on its own in the future when all the work through a joint venture is performed by a populated separate legal entity.
- Proposed rule also required joint venture partners to allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, to access its files and inspect and copy records and documents when necessary.
 - Several commenters requested SBA to clarify that the access should be limited to documents and records relating to the joint venture, not to unrelated documents of the joint venture partners themselves.
 - SBA agrees.

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.



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 any other code (not that they must exceed 50% of firm's revenues).

NEW MENTOR PROTÉGÉ RULE



- New Rules issued on July 25, 2016
 - Grew out of two promulgations
 - The Small Business Jobs Act of 2010
 - The National Defense Authorization Act for Fiscal Year 2013 (NDAA 2013)
- 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
- When to Apply – Available as of October 1st!!!

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



All Small Mentor Protégé Rule

- Any small business is now eligible to be in a Mentor Protégé Agreement
 - Benefits in General
 - The two businesses – Mentor and protégé can joint venture for any Federal Procurement for which the Protégé qualifies
 - The Mentor Protégé Agreement allows for an exemption to affiliation for any provision listed within the agreement – draft carefully and thoughtfully
 - All the benefits previously enjoyed by 8(a) firms
 - Simpler process
 - Open to any small business including 8(a)s
 - On line application (for the most part)

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



2018 NDAA changes affecting you!

- 1. Simplified Acquisition Threshold – increased to \$250,000
- 2. GAO Bid Protest Reforms
 - *A contractor who files a protest described under paragraph (2) with the Government Accountability Office on a contract with the Department of Defense shall pay to the Department of Defense costs incurred for processing a protest at the Government Accountability Office and the Department of Defense.*
 - *When do you pay for filing a protest:*
 - *If you lose every element of the protest, and*
 - *The Party filing the protest has revenues in excess of \$100,000,000 in the previous year*
- *WITHHOLDING OF PAYMENTS ABOVE INCURRED COSTS OF INCUMBENT CONTRACTORS. —*
 - *Contractors who file a protest on a contract on which they are the incumbent contractor shall have all payments above incurred costs withheld on any bridge contracts or temporary contract extensions awarded to the contractor as a result of a delay in award resulting from the filing of such protest.*
 - *Once the protest is decided, generally, if the incumbent wins any element or corrective action is taken – funds are released to them.*
 - *If not the retained funds go to the awardee.*



NDAAs cont.

- Enhanced Debriefing Rights – Big Change
 - *Not later than 120 days after the date of the enactment of this Act, the Secretary of Defense shall revise the Department of Defense Supplement to the Federal Acquisition Regulation to require that all required post-award debriefings must provide detailed and comprehensive statements of the agency's rating for each evaluation criteria and of the agency's overall award decision.*
 - *Protected or privileged information shall be protected in the same manner as is done in a bid protest.*
 - *This includes:*
 - *Disclosure of the agency's written source selection award determination*
 - *A requirement for a combined written and oral debriefing for all contract awards and task or delivery orders valued at \$10,000,000 or higher*
 - *A requirement for an option, at an offerors' election, for access to an unredacted copy of the source selection award determination and the supporting agency record for outside counsel or other appropriate outside representative for all contract awards and task or delivery orders valued at \$10,000,000 or higher*
 - *The agency shall respond in writing to additional, follow-up questions submitted under subparagraph (B) within five business days. The debriefing will not be considered concluded until the agency delivers its written responses to the disappointed offeror.*

NDAA finally!!!

- ***MODIFICATION TO THE HUBZONE PROGRAM.***
 - If a census tract is redesignated or otherwise ceases to be qualified
 - The redesignated area shall continue to be a HUBZone for the 7 year period following the date on which the redesignated area ceases to be qualified.
 - There are some limitations but very few.

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
- Changes to the Affiliation Rules
- HUBZone Changes
- Change to GAO Protest Rules
- Change to Simplified Acquisition Threshold
- Enhanced Debriefings



Questions?



David A. Rose
Principal Attorney
drose@roseconsultingllc.org



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