



U.S. Small Business Administration  
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## National 8(a) Spring 2018 Conference

Presentation by John Klein,  
SBA, and Christine Williams,  
Outlook Law, LLC

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# Your Presenters

## **John Klein, Associate General Counsel for Procurement Law, U.S. Small Business Administration:**

John is the principal legal advisor to senior Agency officials and their staffs with respect to the 8(a) Business Development program; the Agency's Government Contracting programs, including the small business set-aside, subcontracting and Certificate of Competency programs; the HUBZone program; the Small Business Innovation Research program; the Size Standards program; the Service Disabled Veteran-Owned Small Business program; and SBA's internal contracting procedures. Mr. Klein has been a lawyer in SBA's Office of General Counsel since 1983. Suspension and Debarment Official.



# YOUR PRESENTER: CHRISTINE WILLIAMS

[christinewilliams@outlooklaw.com](mailto:christinewilliams@outlooklaw.com)

Christine is an adjunct law professor on government contracting at Seattle University School of Law's Alaska Campus. She is in the Top 5 percent of Government Contract Attorneys in the Nation, according to her peer ratings for Best Lawyer. Christine represents clients in defending against federal investigations, including investigations/reports by the Office of the Inspector General, the Department of Justice, and the GAO. Christine also counsels companies on the procurement and administration of government contracts across all agencies. She has especially deep experience in the SBA and Section 8(a) Programs. Prior to Outlook Law, Christine was a partner at two international law firms.

# Recent Size Decisions

- *Size Appeal of Equity Mortgage Solutions, LLC*, SBA No. SIZ-5867 (2017) OHA finds a prime affiliated with both of two alleged ostensible subcontractors. The Area Office had found the apparent awardee to be small, but OHA reversed based on the ostensible subcontractor rule.
- The ostensible subcontractor rule, 121.103(h)(4), provides, “A contractor and *its ostensible subcontractor* are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is *a subcontractor* that is not a similarly situated entity, as that term is defined in §125.1 of this chapter, and performs primary and vital requirements of a contract, or of an order, or is *a subcontractor* upon which the prime contractor is unusually reliant.”
- Size Appeal of Synaptek Corporation, had the argument that the regulation uses the singular form of “subcontractor.” Thus, “there is no basis in the rule for aggregating the work performed by multiple large subcontractors.”

# Recent Size Decisions

- In *Size Appeal of Lost Creek Holdings*, SBA No. SIZ-5848 (2017), OHA held that the sizes of a prime contractor and its ostensible subcontractor must be aggregated. OHA stated that the rule “explicitly requires” that a prime is affiliated with its ostensible subcontractor (relying on the “**and therefore affiliates**” language of the reg).
- Interestingly, OHA found that the joint venture rule cited was not applicable to the ostensible subcontractor rule because the purpose of the ostensible subcontractor rule is to “prevent other than small firms from forming relationships with small firms to evade SBA's size requirements.”

# Follow On Procurements

- When Important:
- Follow-on must remain in the 8(a) program unless SBA agrees to release
- Adverse impact – not required for follow-on 8(a) acquisitions or new procurements
- For entity-owned firms: follow-on sole source requirement can't be performed by sister company
- Definition
- Don't define follow-on, but define "new" – as a requirement which has not been previously procured
- Expansion or modification of existing requirement – significant enough to cause a price adjustment of at least 25%
- Generally, Must Look at Three Things
- Scope, Magnitude, End-User

# Sole Source Where Previously Competed

- SBA will not accept a requirement if: the procuring activity competed a requirement among Participants prior to offer and acceptance
- Participant owned by a tribe or ANC may be awarded a sole source 8(a) contract . . . if SBA has not accepted the requirement into the 8(a) program as a competitive procurement

# Items to be Covered

- ▶ **When Permitted**
- ▶ **Size Requirements in Joint Ventures**
- ▶ **Joint Venture Requirements**
- ▶ **Joint Venture Review Process**
- ▶ **Summary of Substantive Changes –  
New Regulations**
- ▶ **Unpopulated Joint Ventures**
- ▶ **Reporting Requirements**



# DEFINITIONS

## Joint Venture (JV)

“An agreement between an eligible participant and one or more other business concerns to establish a new entity solely for the purpose of performing no more than three contracts over a two year period.”

## CAPACITY

“The overall ability of a business to meet the quality, quantity and time requirements of the contract.”

# WHEN PERMITTED

- ▶ Firm lacks the capacity to perform the contract independently
- ▶ Joint Venture (JV) arrangement is fair and equitable
- ▶ JV will be of substantial benefit to the Firm
- ▶ Firm brings something of value to the JV other than SB certifications

# AREAS OF CAPACITY

- ▶ Adequate bonding
- ▶ Adequate financing
- ▶ Technical expertise
- ▶ Experience in similar requirements
- ▶ Access to specialized/required equipment
- ▶ Access to appropriate facilities
- ▶ Appropriate management
- ▶ Adequate Labor

# SIZE STANDARD REQUIREMENTS

- ▶ Size Counts:
  - Small Business Set-Asides Firm must be small under action NAICS code
- ▶ JV must meet applicable size standard of the solicitation
- ▶ A large business cannot be a JV participant on a Small Business Procurement unless they have an approved SB MPA

# JOINT VENTURE LIMITATIONS

- ▶ **Joint venture entity can receive no more than three awards over a two year period.**
- ▶ **A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes.**

# OSTENSIBLE SUBCONTRACTOR CONSIDERATIONS

- ▶ Perform vital requirements of a contract
- ▶ Prime contractor is unusually reliant
- ▶ Contract management
- ▶ Technical responsibilities
- ▶ Percentage of subcontracted work
- ▶ Bonding assistance
- ▶ Incumbent contractor

# Similarly Situated and Ostensible Subcontractor Rule

- Similarly Situated Entities and the Ostensible Subcontractor Rule
- How they have played together and recent cautions

# Joint Ventures-Past Performance

- **Past performance.** When evaluating the past performance of an entity submitting an offer for an 8(a) contract is a joint venture approved by the SBA, a procuring activity must consider work done individually by each partner to the joint venture as well as any work done by the joint venture itself previously. Extended to SDVO, HUBZone, and WOSB.
- **Contract execution.** Where the SBA has approved a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity or the 8(a) Participant, but in either case will identify the award is one to an 8(a) joint venture or an 8(a) mentor protégé joint venture, whichever is applicable



# JV Summary Contents Requirements

- ▶ Protege is the managing venturer  
The project manager is an employee of the protégé firm.
- ▶ Protégé will receive profits commensurate with work performed
- ▶ Separate bank account requiring signatures by all parties for withdrawals.
- ▶ Itemization of resources, equipment.

# Summary Contents Requirements

- ▶ Each parties responsibilities regarding contract negotiations, labor sourcing and performance.

- ▶ Commitment to ensure performance

Protégé owns 51% of the JV and it's a separate legal entity.

# Summary Contents Requirements

- ▶ Quarterly financial statements showing cumulative receipts and expenditures submitted to SBA within 45 days of the close of operating quarter.

# Summary Contents Requirements

- ▶ Project end profit and loss statement and final profit distribution will be submitted to SBA within 90 days of contract completion.
- ▶ SBA may inspect records

# Supplemental Information Required

**G. The Joint Venture applicants must analyze the percentages of work to be performed by each firm and each subcontractor. *See* 13 CFR 124.510, 124.513(d); 125.6.**

- ▶ The Joint Venture applicants demonstrate that the partner(s) to the joint venture will perform 40% of the work performed by the joint venture.

# Joint Ventures-Reporting Prior and Completion

- Prior to Award: each partner to the JV must certify that it will perform the contract in compliance with JV regulations and the JV agreement
- During Performance: report annually to the contracting officer and the SBA how they are reading the applicable performance of work requirements for each small business set-aside contract to perform as a joint venture
- After Contract Completion: report certifying compliance and explaining how the performance of work requirements were met for the contract

# Joint Venture Tracking in Data Bases

- The SBA believes that some sort of JV identification is required.
- The regulation requires:
  - JVs are separately identified in SAM;
  - With a separate DUNS number and CAGE number;
  - The Entity Type in SAM must be identified as Joint Venture; and
  - The Joint Venture partners should also be listed.

# Supplemental Information Required

## **I. The Joint Venture applicants must submit the following employee information:**

- ▶ A list of the employees needed to perform the project (by position, type and number in each category);
- ▶ The number and skills of employees supplied to the Joint Venture by each venturer; and
- ▶ A brief description of the hiring and employee management responsibilities of each venturer.



# Questions/Applications

