

8(A) CONTRACTING, MENTOR-PROTÉGÉ PROGRAM, & JOINT VENTURES

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ATTORNEYS AT LAW

THE AUDIENCE

- How many individuals here represent companies that are now or have been in the 8(a) program?
- How many individuals here represent companies that are not now in the 8(a) program but have some interest in and believe they may qualify for the 8(a) program?
- How many individuals here represent service providers to government contracting companies?



OUR DISCUSSION

- Today we will be discussing some of the general rules and regulations governing 8(a) contracting.
- We will provide specific discussion on three hot topics in 8(a) contracting:
 - SBA's Mentor Protégé Program for 8(a) participants
 - SBA's rules for 8(a) Joint Venture Arrangements
 - SBA's proposed changes to the 8(a) Joint Venture Rules



8(A) CONTRACTING

- The name “8(a)” refers to Section 8(a) of the Small Business Act that creates a business development program for approved businesses owned and controlled by socially and economically disadvantaged individuals.
- The SBA originally acted as the intermediary and prime contractor to the government customer and then subcontracted this work.



8(A) CONTRACTING

- The Small Business Act allows the SBA to delegate its authority to negotiate a contract with the 8(a) participant directly to the Agency.
- Under these delegations, done through SBA-Agency partnership agreements, the Agency may enter into contracts directly with the 8(a) participant.
- A condition of these delegations is that, although SBA delegates the authority to sign contracts on its behalf, the SBA remains the prime contractor on all 8(a) contracts awards.



8(A) CONTRACTING

- The SBA now has partnership arrangements with most agencies, so most 8(a) contracts are negotiated and awarded by the Agency and not the SBA.
- From a legal perspective, SBA remains the prime contractor and in control for the purpose of handling problems that may arise in contract performance.



8(A) CONTRACTING

- No 8(a) contractor is guaranteed a contract under the 8(a) program. Participants are required to market their services and/or products directly to the government customers.
- Agencies pursuing their 8(a) contracting goals must get SBA approval to bring work into the 8(a) program. Once in the program, it will be the SBA's final decision whether the work leaves the 8(a) program.



8(A) CONTRACTING

- Agencies are authorized to make a sole-source award to an 8(a) contractor so long as the work has been accepted into the 8(a) program and the proposed contract is valued at \$5.5 million or less for manufacturing NAICS codes and \$3.5 million for all others.
- Agencies may make a sole-source award to an 8(a) concern owned by an Indian Tribe or Alaska Native Corporation without contract limits, unless the work has already been accepted for 8(a) competitive procurement.
- All sole-source awards (and all 8(a) contracts) must be approved by SBA.



8(A) CONTRACTING

- For procurements accepted in the 8(a) program:
 - whose expected award price exceeds \$5.5 million for manufacturing or \$3.5 million for all others;
 - ***and*** where there is a reasonable expectation that two or more responsible 8(a) contractors will submit offers to perform the work at a fair market price (rule of 2s),
 - ***then*** the work must be competed among eligible 8(a) participants.



8(A) CONTRACTING

- An 8(a) participant performing an 8(a) set-aside contract must perform:
 - 50% of the (labor) cost of the contract with its own employees for a service contract;
 - 15% of the (labor) costs of the contract with its own employees for a general construction contract;
 - 25% of the (labor) costs of the contract with its own employees for a specific trades construction contract.



8(A) CONTRACTING

- For ID/IQ services and supply contracts, the 8(a) contractor need not perform 50% of each task order issued under the contract.
- Under an ID/IQ, the 8(a) company must perform 50 percent of the applicable costs for the combined total of all task orders issued to date at six month intervals.



8(A) CONTRACTING

- ID/IQ contract example on percentage requirement:
 - Two task orders are issued under an 8(a) ID/IQ contract during the first six months of the contract. If \$100,000 in personnel costs are incurred on the first task order, and 90% of those costs (\$90,000) are incurred by the 8(a)'s own employees, and the second task order also requires \$100,000 in personnel costs, the Participant would have to perform only 10% of the personnel costs on the second task order. The six month average for the 8(a) would work out as \$100,000 out of the \$200,000 total.

8(A) CONTRACTING

- The required percentage of contracting cannot be met by consultants or other independent contractors. Consultants and other independent contractors (1099s) are considered subcontractors for purposes of this rule.
- Under the delegation of authority from SBA to the agencies, the agencies are obligated to monitor the 50% performance requirement.



8(A) CONTRACTING

- The contracting officer must advise SBA of any intent to terminate an 8(a) contract for default -- in writing -- before doing so.
- SBA may provide to the participant some assistance and act as an intermediary between the agency and the contractor.
- Any procuring activity contracting officer who believes grounds for termination continue to exist may terminate the 8(a) contract for default.



8(A) CONTRACTING

- *After* consulting with SBA, the procuring activity contracting officer may terminate an 8(a) contract for convenience when it is in the best interests of the Government to do so.
- A termination for convenience is appropriate if any disadvantaged owner of the participant performing the contract relinquishes ownership or control of such concern, or enters into any agreement to relinquish such ownership or control, unless a waiver is granted by the SBA.



8(A) CONTRACTING

- Despite the SBA's role as prime contractor in all 8(a) contracts, any and all contract disputes that cannot be resolved through negotiation must be resolved pursuant to the Contract Disputes Act.
- All litigation is resolved at the appropriate Board of Contract Appeals or the U.S. Court of Federal Claims.



MENTOR-PROTÉGÉ PROGRAM

- The SBA Mentor-Protégé program is designed to enhance the capability of 8(a) participants by pairing them with more experienced, often larger companies.
- Mentors provide technical and management assistance, financial assistance in the form of subcontract support, assistance in performing prime contracts, including through joint venture arrangements, and also may provide equity investments and/or loans to the 8(a) participant.
- A Mentor-Protégé relationship will provide some protection against a size protest claiming undue reliance on a subcontractor.



MENTOR-PROTÉGÉ PROGRAM

- The protégé must meet the following requirements to participate in the program:
 - It must be in the developmental stage of the 8(a) program (years 1-4), or have never received an 8(a) prime contract, or have a size of less than half the size standard for a small business based on its primary NAICS code.
 - It must be in good standing in the 8(a) BD program and be current with all reporting requirements.
 - Protégés may have only one mentor at a time.



MENTOR-PROTÉGÉ PROGRAM

- The mentor can be a business that has graduated from the 8(a) BD program, an 8(a) firm in the transitional stage of the program (years 4-9), or a small or large business.
- A mentor must have the capability to assist the protégé and must make a commitment for at least a year. In addition, it must demonstrate the following:
 - that it enjoys favorable financial health, including profitability for at least the last two years,
 - that it is a federal contractor in good standing, and
 - that it can provide valuable support to a protégé through lessons learned and practical experience gained from the 8(a) BD program, or through its general knowledge of government contracting.
- Generally, a mentor will not have more than one protégé at a time without SBA authorization.



MENTOR-PROTÉGÉ PROGRAM

- Mentor and protégé firms enter into an SBA-approved written agreement outlining the protégé's needs and describing the assistance the mentor has committed to providing.
- SBA approves the M-P agreement through its district office and conducts annual reviews to determine the success of the mentor-protégé relationship.



8(A) JOINT VENTURES

- If approved by SBA, an 8(a) company may enter into a joint venture agreement with one or more other small business concerns -- whether or not 8(a) companies -- for the purpose of performing a specific 8(a) contract.
- A joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, and the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern.



8(A) JOINT VENTURES

- If SBA concludes that an 8(a) concern brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA will not approve the joint venture arrangement.



8(A) JOINT VENTURES

- There are two types of 8(a) Joint Ventures, each having different rules:
 - An 8(a) Joint Venture between Mentor and Protégé, and
 - An 8(a) Joint Venture not between Mentor and Protégé.



8(A) JOINT VENTURES

- An approved Non-MP 8(a) joint venture may submit an offer as a small business for a competitive 8(a) procurement so long as *each concern* is small under the size standard corresponding to the NAICS code assigned to the contract, provided
 - (i) The size of at least one 8(a) participant to the joint venture is less than one half the size standard corresponding to the NAICS code assigned to the contract; and
 - (ii)(A) For a procurement having a revenue-based size standard, the procurement exceeds half the size standard corresponding to the SIC code assigned to the contract; or
 - (B) For a procurement having an employee-based size standard, the procurement exceeds \$10 million.



8(A) JOINT VENTURES

- An M-P joint venture, between a protégé firm and its approved mentor, will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement.
- Only M-P joint ventures can contain a large business as a JV member.



8(A) JOINT VENTURES

- The Joint Venture Agreement, for purposes of SBA Approval, must contain the following provisions:
 - (1) It must state the purpose of the joint venture;
 - (2) It must designating an 8(a) participant as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for performance of the 8(a) contract;
 - (3) It must state that not less than 51 percent of the net profits earned by the joint venture will be distributed to the 8(a) company;
 - (4) It must provide for a special bank account in the name of the joint venture, requiring the signature authority of *all* parties to the joint venture for check writing. Deposits and expenses must go through this account;

8(A) JOINT VENTURES

- The Joint Venture Agreement, for purposes of SBA Approval, must contain the following provisions:
 - (5) It must itemize assets to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each;
 - (6) It must specify the responsibilities of the parties;
 - (7) It must obligate all parties to the joint venture to complete performance despite the withdrawal of any member;
 - (8) It must designate that accounting and other administrative records relating to the joint venture be kept in the office of the managing venturer;
 - (9) It must require the final original records be retained by the managing venturer upon completion of the 8(a) contract performed by the joint venture;



8(A) JOINT VENTURES

- The Joint Venture Agreement, for purposes of SBA Approval, must contain the following provisions:
 - (10) It must state that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and
 - (11) It must state that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.



8(A) JOINT VENTURES

- For any 8(a) contract, including those between mentors and protégés , the joint venture must perform the applicable percentage of work (50% on service contracts), and the 8(a) partner(s) to the joint venture must perform **a significant portion of the total contract.**

8(A) JOINT VENTURES

- SBA approval of the JV entity must be obtained prior to award of the contract
- The contract must be executed in the name of the JV entity itself and not the 8(a) member.



8(A) JOINT VENTURES

- Summary of the proposed changes to the 8(a) Joint Venture Rules:
 - Change regarding the number of contract opportunities any single joint venture can pursue;
 - Clarifies the rules affecting whether the JV must be certain type of entity and whether the joint venture is populated;
 - Changes the rule requiring SBA prior approval on subsequent JV awards.



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- Questions?

8(A) CONTRACTING, MENTOR-PROTÉGÉ PROGRAM, & JOINT VENTURES

Any subsequent questions, please feel free to contact:

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