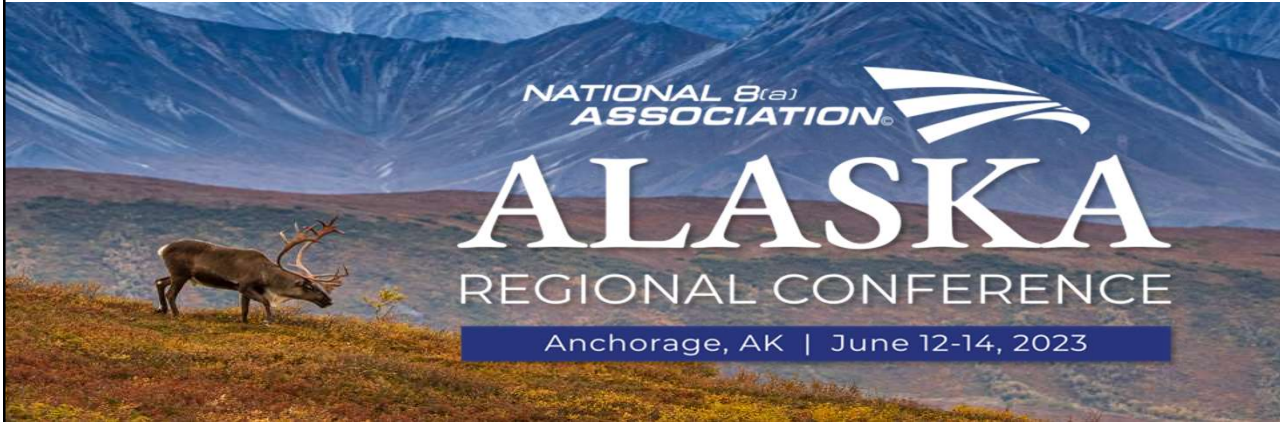




Birch Horton Bittner & Cherot
a professional corporation



Joint Ventures: Pitfalls and Lessons Learned

© Birch Horton Bittner & Cherot, P.C. 2023

Moderator

Carissa Siebeneck Anderson

Of Counsel

Birch Horton Bittner & Cherot

canderson@bhb.com

202.659.5800



2023 ALASKA REGIONAL CONFERENCE | JUNE 12-14 | ANCHORAGE, AK

© Birch Horton Bittner & Cherot, P.C. 2023

Panelist:

Steve Roberts



Steve Roberts is a Business Opportunity Specialist that services 51 8(a) companies in his portfolio. He is responsible for supporting the SBA's government contracting and business development programs, as well as developing and conducting outreach and training to strengthen and improve business opportunities for both procurement agencies and eligible small businesses. Prior to joining the SBA, Steve was a Contract Specialist with the National Park Service here in Alaska.

steven.roberts@sba.gov

Panelist:

Mark Hagedorn



Mark Hagedorn is the Acting Director for the Office of Business Development's Division of Program Certification and Eligibility, and an Attorney Advisor in the Office of Procurement Law at the U.S. Small Business Administration (SBA) in Washington, DC. He oversees the offices responsible for processing 8(a) Business Development (BD) program applications and matters related to continuing program eligibility. He also serves as a legal advisor to Agency officials and their staffs with respect to the 8(a) Business Development program; the Women-Owned Small Business Concern program; the Service-Disabled Veteran-Owned Small Business Concern program; the HUBZone program; the Mentor-Protégé Program; suspension and debarment matters; and SBA's internal contracting procedures. Mr. Hagedorn also represents the Agency in matters before SBA's Office of Hearings and Appeals and the Government Accountability Office.

mark.hagedorn@sba.gov

Panelist:

Kanika "K.A." Perkins



Kanika "K.A." Perkins is currently the Deputy Director of the All Small Mentor Protégé Program for the US Small Business Administration. Housed in Washington DC, she leads a tiny but mighty team of application and continuing eligibility Analysts for one of SBA's newest programs, now in its third year of existence. K.A. oversees the operations of the program – ensuring that every decision we make is in the best interest of building the small business' capacity, whether it's through business development or contracting.

Before joining ASMPP in July of 2019, K.A. was a Business Management Specialist with SBA in Washington DC. She served as a subject matter expert in 8(a) regulations and federal procurement, and worked directly with 8(a) firms, federal agencies, and SBA District Offices to resolve federal contracting actions that are in the best interest of 8(a) firms she serves and the 8(a) portfolio.

sbamp@sb.gov

2023 ALASKA REGIONAL CONFERENCE



Joint Ventures

- Overview of Requirements
- Types of JVs
- Two-Year Rule & Risks of Non-Compliance
- Size of Joint Ventures
- Key Compliance Risks

Small Business Joint Ventures Overview



- **What is a Joint Venture?** An association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out **unlimited contracts** over a two-year period.
 - While it is possible to form a second JV between parties, SBA rules require the JV to be of limited duration or risk affiliation, which may lead to the JV losing its "small business" size status.
- **Why form a Joint Venture?** Joint venture participants combine their efforts, property, money, skill, or knowledge, to seek a particular contract or certain types of contract opportunities (but not on a continuing or permanent basis for conducting business generally).
 - **Government BENEFIT:** Agencies get teams of small businesses with complementary capabilities instead of one small business. This allows agencies to push more work with greater value and greater demands, to small businesses, which in turn makes it easier for agencies to achieve its general and specific small business contracting goals for each year. In addition, agencies benefit specifically on that contract from getting the increased stability, greater expertise, more extensive past performance, and greater capacity of having two or more small businesses working as a team to meet the government's contract requirements.
- **Size of JVs:** A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as **each** concern is small under the size standard corresponding to the NAICS code assigned to the contract. 13 CFR 121.103(h)(3)(i).
 - JVs & Large Business Venturers. A small business protégé may team with a large business mentor in an SBA-approved Mentor-Protégé JV.

2023 ALASKA REGIONAL CONFERENCE | JUNE 12-14 | ANCHORAGE, AK

7

© Birch Horton Bittner & Cherot, P.C. 2023 | www.birchhorton.com

Joint Ventures Overview of Requirements



- Managing Venturer (MV) must be the Small Business/8(a)/etc.
- MV Small Business/8(a) must own at least 51% of the JV.
- Each JV partner must receive profits commensurate with the it work performed OR greater (for Managing Venturer) by agreement.
- Small Business/8(a) must perform at least 40% of the work performed by the JV.
- SBA Approval – 8(a) Sole Source v. 8(a) Competitive & All Small
 - 8(a) Sole Source M-P JV: SBA must approve the JVA before the award can be accepted by the JV.
 - Competitive 8(a) and All Small M-P JV: SBA pre-approval of the JVA is not required. However, like 8(a) firms, the JV partners must submit certifications of compliance prior to performance of a JV M-P contract.

2023 ALASKA REGIONAL CONFERENCE | JUNE 12-14 | ANCHORAGE, AK

8

© Birch Horton Bittner & Cherot, P.C. 2023 | www.birchhorton.com

Types of Joint Ventures



- **Traditional Small Businesses JV:** A joint venture is when two or more small business concerns submit an offer as a small business for a federal procurement. The procurement may be bundled or non-bundled.
- **Socioeconomic JV/Traditional 8(a) Procurement JV:** An 8(a) concern partners with one or more other small business concerns as a joint venture on an 8(a) procurement. See 13 C.F.R. § 124.513(b).
- **Mentor-Protégé JV:** Two firms are in an SBA-approved Mentor-Protégé agreement. This can be under the All Small MPP or 8(a) MPP. Eligibility based on Protégé size/certification.

2023 ALASKA REGIONAL CONFERENCE | JUNE 12-14 | ANCHORAGE, AK

© Birch Horton Bittner & Cherot, P.C. 2023 | www.birchhorton.com

9

The Two Year Rule



- **JVs are temporary.** For this purpose, joint venture participants combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally.
- **How many contracts can my JV receive?**
- **OLD RULE -** SBA Limit on JVs is a max of 3 contracts in 2 years. Under SBA regulations, JVs are limited to no more than three specific contracts over a two-year period.
- **NEW RULE -** The joint venture may receive UNLIMITED additional 8(a)/small business contracts where a proposal including price was submitted within two years of the first award. See 13 CFR § 121.103(h). Effective date: Nov. 16, 2020.
 - 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.
 - An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer including price prior to the end of that two-year period.
 - “Contracts” include prime contracts, novations of prime contracts, and any subcontract in which the joint venture is treated as a similarly situated entity.

2023 ALASKA REGIONAL CONFERENCE | JUNE 12-14 | ANCHORAGE, AK

© Birch Horton Bittner & Cherot, P.C. 2023 | www.birchhorton.com

10

The Two Year Rule Risks of Non-Compliance with Two Year Rule



- **Non-compliance Risk of violating JV two-year rule = Affiliation.** A specific joint venture entity generally may not be awarded contracts beyond a two-year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for the joint venture.
 - SBA will find joint venture partners to be affiliated, and thus will aggregate their receipts and/or employees in determining the size of the joint venture for all small business programs, where the joint venture submits an offer after two years from the date of the first award.
- **Solution – New JVs.** The same two (or more) entities may create additional joint ventures, and each new joint venture entity may submit offers for a period of two years from the date of the first contract award to the joint venture without the partners to the joint venture being deemed affiliates.
 - NOTE: At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them.
- **Practice Tip: Set up a compliance deadline for BD Team.** First award to JV + 2 years = period to submit as many proposals with price as possible on behalf of JV.
 - Once period is up, JV must stop submitting proposals or risk affiliation. JV Partners can consider forming a second JV, but we strongly recommend varying the terms/purpose of the JV to show distinction and evolution of responsibilities for MV.

2023 ALASKA REGIONAL CONFERENCE | JUNE 12-14 | ANCHORAGE, AK

11

© Birch Horton Bittner & Cherot, P.C. 2023 | www.birchhorton.com

Joint Ventures Size of Joint Venture



- **Size of Small Business JVs:** A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract. 13 CFR 121.103(h)(3)(i).
 - JVA Content – two or more small businesses forming a JV do not need an specific form or conditions in a JVA to qualify as a small business.
- **8(a) + Small Business JVs.** For a competitive 8(a) procurement, a joint venture between an 8(a) Participant and one or more other small business concerns (including two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter) must also meet the requirements of § 124.513(c) and (d) as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding in order to be eligible for award.
- **Size Mentor-Protégé JVs: General Rule.** Two firms approved by SBA to be a mentor and protégé under § 125.9 may joint venture as a small business for any Federal government prime contract or subcontract, provided:
 - the **protégé qualifies as small** for the size standard corresponding to the NAICS code assigned to the procurement, **and**
 - the joint venture meets the requirements of § 124.513 (c) and (d), § 125.8(b) and (c), § 125.18(b)(2) and (3), § 126.616(c) and (d), or § 127.506(c) and (d) of this chapter, as appropriate.
- **Size Determination Date varies for 8(a) Sole Source Contracts.** Sole source 8(a) award, the joint venture must demonstrate that it meets the requirements of § 124.513(c) and (d) **prior to the award** of the contract.
- **Enforcement Note.** Size of JV can be protested by unsuccessful competitors in competitive award.

2023 ALASKA REGIONAL CONFERENCE | JUNE 12-14 | ANCHORAGE, AK

12

© Birch Horton Bittner & Cherot, P.C. 2023 | www.birchhorton.com



Pre-Award JV Pitfalls: Setting Up JV & Pre-Award Requirements

Potential Pitfalls JV Set-up & Pre-Award



- **Failure to complete/maintain required SAM registration**
- **Non-compliant JV Agreement** (does not meet minimum requirements 13 CFR 125.8/124.513)
 - Missing mandatory JV Agreement components (usually profits, control)
 - Impermissible negative control by JV Partner
 - Failure to customize JV Agreement to procurement at hand (specific mix of personnel, equipment, facilities provided by each venturer)
 - Responsible Manager/Day-to-Day Manager is not employee of Managing Venturer (cannot be former Mentor/Minority Partner employee)
 - Failure to finalize and execute JV Agreement prior to competitive proposal submission (or prior to SS award)
- **Size & Affiliation**
 - Affiliation – Failure to Comply with Two-Year Rule



Post-award Pitfalls: JV Pitfalls during performance



Potential Pitfalls Performance

- **Inadequate Managing Venturer Control**
 - Lack of onsite supervision
 - Negative control of JV performance or LLC by Partner Venturer
- **Failure to comply with double layer of Performance of Work/Subcontracting Limitations**
 - Pass-Through Contracts/Inadequate Capacity of Managing Venturer
- **Failure to Perform Contract**
 - lack of JV partner subcontracts/enforcement
 - Contract overreaching - inability to perform, lack of necessary capacity or expertise, lack of funding
- **Failure to properly allocate revenue from JV to small business (size)**



Let's talk about the pitfalls & lessons learned



**LESSON LEARNED:
JV must be registered & active in
SAM prior to proposal submission**



AVOIDING PITFALLS: Negative control & allowable powers of minority venturers

Recent SBA rule clarification: Minority venturers may participate in “commercially customary” corporate governance activities

FINAL RULE EXCERPT – *As previously noted, the **managing joint venture partner must independently control all aspects of the day-to-day management and administration of the contractual performance of the joint venture.** SBA believes that **initiating contract litigation is outside the scope of the management of daily contractual performance and instead represents a decision that reasonably falls into the exception that allows other joint venture partners to participate in commercially customary decisions.** A joint venture is a mutual agreement between joint venture partners to combine resources for a specific contract or contracts, and litigation is sometimes required to protect those resources. **Litigation on behalf of the joint venture is a decision that carries significant risk for both partners and as a result, it is unreasonable and outside the bounds of customary commercial practices to limit that decision to only one partner.** Similarly, SBA believes that requiring the concurrence of a non-managing joint venture partner in **deciding what contract opportunities the joint venture should seek** is also something that would be commercially customary. The partners to a joint venture have formed a joint venture in order to seek contract opportunities. Since the parties will be jointly and severally liable for any contracts awarded to the joint venture, it makes sense that all parties to the joint venture should have a say in what opportunities the joint venture pursues. The final rule adds language specifying that a non-managing venturer’s approval may be required in determining what contract opportunities the joint venture should seek and in initiating litigation on behalf of the joint venture. That addition is not meant to be the only decisions in which a non-managing member may participate but is merely illustrative of corporate governance activities and decisions of the joint venture that SBA believes nonmanaging venturer participation is commercially customary.*

- 88 FR 26164, 26167 (Apr. 27, 2023).

When is unanimous consent of JV Partners allowable?

No negative control permitted; Managing Venturer Must Control.	Yes, Powers that <u>May</u> Require Unanimous Consent	Yes, Powers that <u>MUST</u> Require Unanimous Consent
<ul style="list-style-type: none"> a) Day-to-day management and administration of the contractual performance of the JV must be controlled by Managing Venturer b) Power to appoint, oversee, and remove Responsible Manager, who must be employee of Managing Venturer (and not a former employee of minority partner) c) Records – During JV performance, all accounting, administrative records must be kept in office of Managing Venturer unless SBA approves otherwise. All final original records of JV must be retained by Managing Venturer. 	<ul style="list-style-type: none"> a) Minority Venturer <u>MAY</u> participate in commercially customary corporate governance activities of the JV. Including the following b and c below. b) Initiating litigation on behalf of joint venture (mentioned in rule). (e.g. JV filing a protest, intervening in protest as awardee, or filing claim on behalf of JV). c) Other decisions involving litigation, such as settling, or abandoning claims 	<ul style="list-style-type: none"> a) Determining which contract opportunities the JV will pursue (mentioned in rule and SBA guidance in Final Rulemaking) b) Consent (or signature) of all parties to the JV for any payments made by the joint venture to its members for services performed

GOOD TO KNOW: How does the streamlined JV agreement review process work?



GOOD TO KNOW: What are the rules for JV revenue allocation to partners?

JV Revenue Allocation

For size purposes, revenue and/or employees from a JV are split amongst the members.

Calculation of Receipts:

- For size purposes, a concern must include in its receipts its “proportionate share” of joint venture receipts.
- **Unpopulated JV = % Work performed**
- **Populated JV = % Ownership**

Employee-based NAICS Codes:

- In determining the number of employees, a concern must include in its total number of employees its “**proportionate share**” of individuals employed by the joint venture.
- For the calculation of employees, the appropriate share is the same percentage of employees as the joint venture partner's percentage ownership share in the joint venture, after first subtracting any joint venture employee already accounted for in one of the partner's employee counts.
- **% of Ownership**



LESSONS-LEARNED: Avoiding Suspension & Debarment



QUESTIONS?



AVOIDING PITFALLS: two layers of subcontracting limitations

Subcontracting Limitations Overview

- **What are they?**
- Mandatory limits on the percentage of work that a Prime small business contractor can subcontract out to other businesses.
- They are a crucial aspect of compliance with the 8(a) program, small business contracts, and other special small business programs.
- **Varies by Contract Type.** In general, depending upon the type of contract involved, the **self-performance** requirements range from:
 - 50 percent of the costs incurred for most service and manufacturing contracts
 - 25 percent for special trade construction
 - 15 percent for general construction contracts.

Subcontracting Limitations Similarly Situated Entity (SSE) Exclusion

- **Why is this SSE exclusion useful and important?**
 - **SSE work is not “subcontracting”** for purposes of determining compliance with the applicable limitation on subcontracting. So work done by these SSEs will **count toward self-performance** percentages as if the prime performed the work itself.
 - **Purpose of exclusion:** Subcontracts between a small business prime contract and a SSE subcontractor are excluded from the limitations on subcontracting calculation because it does not further the goals of SBA's government contracting and business development programs to penalize small business prime contract recipients that benefit the same small business program participants through subcontract awards.
- **Exclusion is applicable only to first-tier subcontractors.** Work that is not performed by the employees of the prime contractor or employees of first tier SSE subcontractors will count as subcontracts performed by non-SSEs.
- **CAUTION: Independent Contractors = Subcontracts unless SSEs.** Work performed by an independent contractor shall be considered a subcontract, and may count toward meeting the applicable limitation on subcontracting where the independent contractor qualifies as a similarly situated entity (SSE).

Subcontracting Limitations Period of Compliance

- **General Rule** – Each Base Period & Each Option Period.
 - 13 C.F.R. § 125.6(e) directs the agency to consider compliance for **the base period as well as each option period.**
- **MACs/IDIQs:** For Indefinite Delivery/Indefinite Quantity (IDIQ) contracts, requirements are applied on the basis of each task/delivery orders.
 - **Total/Partial Set-Aside IDIQs – Check your Contract.** The contracting officer, in his or her discretion, may require the concern to comply with the applicable limitations on subcontracting and the nonmanufacturer rule for each order awarded under a total or partial set-aside contract. FAR 52.219-14.
 - **Set-Asides Under Full & Open IDIQ Contracts.** For an order set aside under a full and open contract or a full and open contract with reserve, the agency will use the period of performance for each order to determine compliance unless the order is competed among small and other-than-small businesses (in which case the subcontracting limitations will not apply).
- **CO Discretion to Monitor Compliance Throughout Contract Performance.**
 - Contracting officers may, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer.
 - Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

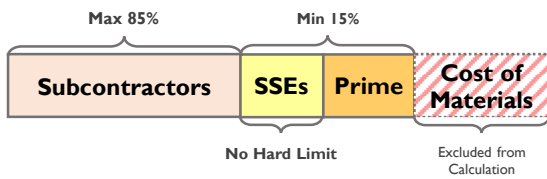
Subcontracting Limitations Calculating Compliance

Handout

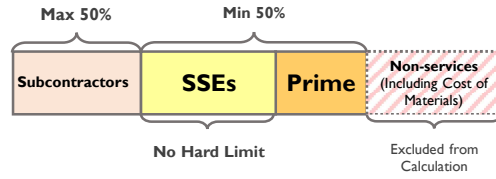
- Similarly Situated Entities are **excluded** from subcontracting limitations
 - “[T]he NDAA deems any work done by a similarly situated entity not to constitute “subcontracting” for purposes of determining compliance with the applicable limitation on subcontracting.”
 - However, any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded.

Similarly Situated Entity
A subcontractor that has the same small business program status as the Prime and is small for the NAICS code that the Prime assigned to the SSE's subcontract.

Construction Contract w/ SSE Exemption



Services Contract w/ SSE Exemption



© Birch Horton Bittner & Cherot, P.C. 2023

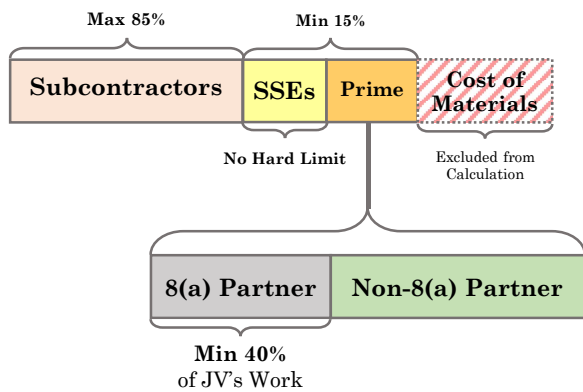
31

Subcontracting Compliance Calculating Compliance for MP JV Contracts

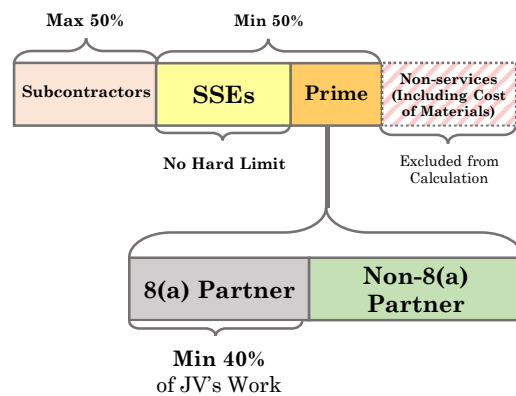
Double Calculation!

Handout

JV Construction Contract w/ SSE Exemption



JV Services Contract w/ SSE Exemption



© Birch Horton Bittner & Cherot, P.C. 2023

32



RECAP

Pre-Award JV Pitfalls & Post-Award Pitfalls



Potential Pitfalls JV Set-up & Pre-Award

- **Failure to complete/maintain required SAM registration**
- **Non-compliant JV Agreement** (does not meet minimum requirements 13 CFR 125.8/124.513)
 - Missing mandatory JV Agreement components (usually profits, control)
 - Impermissible negative control by JV Partner
 - Failure to customize JV Agreement to procurement at hand (specific mix of personnel, equipment, facilities provided by each venturer)
 - Responsible Manager/Day-to-Day Manager is not employee of Managing Venturer (cannot be former Mentor/Minority Partner employee)
 - Failure to finalize and execute JV Agreement prior to competitive proposal submission (or prior to SS award)
- **Size & Affiliation**
 - Affiliation – Failure to Comply with Two-Year Rule

Potential Pitfalls Performance



- **Inadequate Managing Venturer Control**
 - Lack of onsite supervision
 - Negative control of JV performance or LLC by Partner Venturer
- **Failure to comply with double layer of Performance of Work/Subcontracting Limitations**
 - Pass-Through Contracts/Inadequate Capacity of Managing Venturer
- **Failure to Perform Contract**
 - lack of JV partner subcontracts/enforcement
 - Contract overreaching - inability to perform, lack of necessary capacity or expertise, lack of funding
- **Failure to properly allocate revenue from JV to small business (size)**

2023 ALASKA REGIONAL CONFERENCE | JUNE 12-14 | ANCHORAGE, AK

© Birch Horton Bittner & Cherot, P.C. 2023 | www.birchhorton.com

35



QUESTIONS?



Contact Information

Mark Hagedorn

Acting Director, Division of Program Certification and Eligibility, Office of Business Development

Attorney Advisor, Office of Procurement Law

U.S. Small Business Administration

mark.hagedorn@sba.gov

Kanika Perkins

Deputy Director, All Small Mentor Protégé Program

U.S. Small Business Administration

sbampp@sba.gov

Carissa Siebeneck Anderson

Of Counsel

Birch Horton Bittner & Cherot

canderson@bhb.com

202.659.5800

Steven Roberts

Business Opportunity Specialist, Alaska District Office

U.S. Small Business Administration

907.342.5820

steven.roberts@sba.gov

© Birch Horton Bittner & Cherot, P.C. 2023 2023 ALASKA REGIONAL CONFERENCE | JUNE 12-14 | ANCHORAGE, AK

36