



ALASKA

REGIONAL CONFERENCE

JUNE 20-23, 2022 — ANCHORAGE

SBA's Mentor Protégé Program and Joint Ventures

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TODAY'S OUTLINE

- Big Picture Impacts and Strategic Considerations
- Overview of SBA's M-P Program
- Overview of SBA Joint Venture Requirements
- Recent case law and updates
- What's Next for the ASMP Program?



Big Picture Impacts / Strategic Considerations

SBA's "all small" mentor protégé program has a substantial impact on procurement:

- Is leading to larger procurements in other set-aside programs
- Creates competition for the 8(a) Program
- Creates new opportunities for 8(a) and graduated 8(a) businesses
- Ensures the protégé's SBA status (8(a), WOSB, HUBZone, SDVO) stays in tact, as long as program rules are followed



Big Picture Impacts / Strategic Considerations

Some key things to consider in pursuing a Mentor-Protégé Relationship:

- What are your goals from the relationship?
- What characteristics are you looking for in a partner?
- Is the mentor ready, willing and able to provide the assistance promised?
- Is the protégé ready, willing and able to accept the assistance provided?
- Have you worked together before? (usually a good idea)



OVERVIEW OF THE SBA's MENTOR PROTÉGÉ PROGRAM



“All Small” Mentor-Protégé Program

KEY BENEFITS

- Expanded the Mentor-Protégé Program from 8(a) Program to **ALL categories of small business**
- Protégé gets **business development assistance** from Mentor
- Mentor-Protégé may **joint venture** as a small business for any government prime contract or subcontract for which the protégé is eligible **(exception to affiliation!)**
- To raise capital, Mentor may purchase up to **40% equity in Protégé, but be wary of this**

KEY REQUIREMENTS

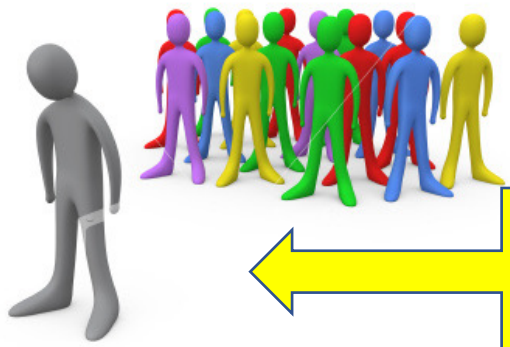
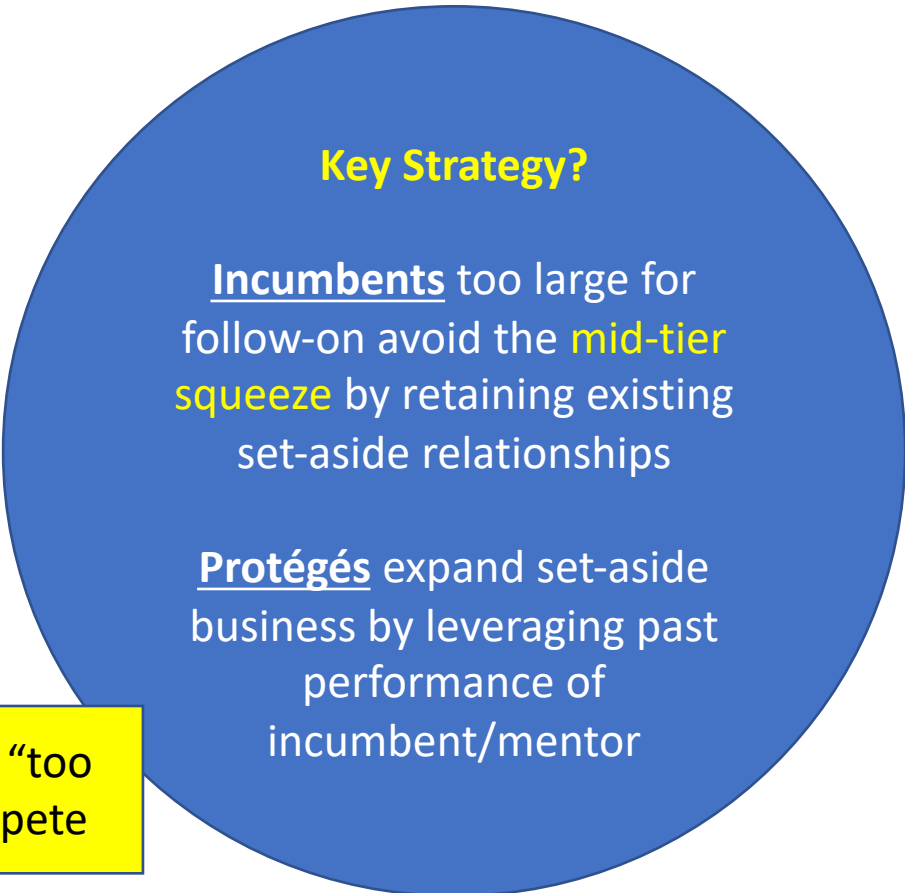
- Written Mentor-Protégé Agreement **approved by SBA**
- **SBA approves all changes** to agreement
- **Annual report by Protégé** regarding provision of assistance
- **Annual SBA review** of the M-P relationship
- Failure to comply with M-P Agreement is **grounds for debarment**
- JV Agreement must comply with § 125.8(b)(2)

“All Small” Mentor-Protégé Program

KEY LIMITS

- Protégé can have up to *two mentors* in unrelated NAICS codes
- Mentor can have up to *three protégés* at one time
- A Protégé can also *be a Mentor* if the relationships don't compete
- M-P Agreements limited to two 3-year terms

Current SBA approval process is more efficient than the 8(a) Process



← “Too big” and “too small” to compete

Written Mentor Protégé Agreement

- **Assessment of Protégé's Needs and Description of Goals**
- **Mentor Assistance Plan:** Detailed description and timeline for Mentor's delivery of assistance
- **Address How the Assistance will Help the Protégé Meet Goals**
- **Establish Single Point of Contact in Mentor** responsible for managing and implementing the M-P Agreement
- **Term of Agreement:** At least one year but not more than three years (with option to extend for a second three-year term)
- **Termination:** Either party may terminate the agreement on 30 days notice



Forms of Assistance Available

- SBA's Mentor-Protégé Programs generally speak to six areas of potential assistance:
 1. Technical and Management
 2. Financial Assistance
 3. Contractual Assistance
 4. Trade Education Assistance
 5. Business Development Assistance
 6. Administrative Assistance
- Mentors are not required to provide assistance in all six areas, but the Affiliation exception only applies to assistance provided for in the agreement.



SBA Must Approve the M-P Agreement

SBA must approve all changes to the M-P Agreement in advance

- SBA may propose suspension or debarment if the M-P Agreement is changed without SBA's approval

SBA reviews the relationship annually and determines whether to approve its continuation for another year.

- The “Mentor Assistance Plan” is key roadmap for annual review
- Is assistance being provided per the plan?
- Based on Protégé's Annual Report

SBA may terminate the M-P Agreement at any time if it determines:

- Protégé is not benefitting from the relationship
- The parties are not complying with any terms or conditions



Protégé Submits Annual Reports to SBA

- **Contents:** For the proceeding year:
 - All technical or management assistance provided by mentor
 - All loans or equity investments made by the mentor
 - All subcontracts awarded between the protégé and mentor
 - All federal contracts awarded to the mentor-protégé joint venture
 - Narrative describing the success of the mentor's assistance
 - Certification: No changes to the M-P Agreement not approved by SBA
- **SBA will rely on the report to determine whether to approve the relationship for another year.**



Termination of M-P Agreement

- Mentor **ineligible** to act as a mentor for two years
- SBA May recommend **stop work order of JV contracts** and substitution of protégé for the JV
- Possible grounds for **suspension and debarment**



Joint Ventures



Joint ventures: the basics

- What is a joint venture?
 - Distinct (if properly designed) from a prime/subcontractor relationship
 - Contains certain elements such as agreement to split profits and share responsibility for performance
- The FAR contemplates the two different approaches as part of “teaming arrangements” (FAR part 9)
- SBA rules provide that parties that are engaged in a joint venture are deemed to be affiliates, unless certain exceptions apply
- Beware of the ostensible subcontractor rule!



SBA's joint venture affiliation exception

- SBA's regulations provide for two exceptions to the joint venture affiliation rules:
 - Where both parties to the joint venture are “small” for the procurement(s) they are pursuing
 - Where the parties are in a SBA-approved mentor/protégé arrangement & the protégé is small & meets the socioeconomic requirements of the solicitation (*i.e.*, 8(a) if applicable)
- SBA's regulations also provide an affiliation exception for mentors and proteges:
 - “No determination of affiliation or control may be found between a protégé firm and its mentor based solely on the mentor-protégé agreement or *any assistance provided pursuant to the agreement*. However, affiliation may be found for other reasons set forth in [§ 121.103](#) of this chapter.”
- In both cases the JV must adopt an agreement that meets SBA's requirements and JV's should be expressly contemplated in the MPA



SBA regulations governing joint ventures

- SBA's regulations impose significant requirements on joint ventures including:
 - Joint ventures can only be of **limited duration** (2 years) and for **limited purposes** (pursuit of specific contracts)
 - The parties must adopt a **written joint venture agreement**, confirming to SBA's regulatory requirements
 - The joint venture must be **“unpopulated”** (except for administrative personnel)
 - The joint venture must be registered in SAM & obtain CAGE Code, DUNS, etc.
- More on these and other issues below in the context of SBA's recent regulatory changes...



Joint venture agreements

- Previously, SBA was required to approve all joint venture agreements for 8(a) set-aside procurements, including addenda to such agreements for additional opportunities
 - But not a requirement under SBA's All Small Mentor/Protégé Program...
- As part of the rule change, SBA dropped the approval requirement for joint venture agreements for all but sole source 8(a) awards
 - Reasoning? Protest process will address competitive 8(a) awards



But you still need a joint venture agreement

- Joint ventures must adopt a joint venture agreement conforming to SBA's regulations:
 - For small business joint ventures, see 13 C.F.R. § 125.8
 - For 8(a) joint ventures, see 13 C.F.R. § 124.513
 - Parallel regulations for WOSB JVs, HUBZone JVs & SDVOSB JVs
- The joint venture agreement must conform to the content prescribed by SBA's regulations...
- Note: regulations also require that the small business prime control the joint venture (e.g., by being the managing JV partner, etc.)



Ok, so what needs to be in the JVA?

- First, joint venture agreements must address each specific procurement the JV intends to compete for!
 - Why? Keeps with SBA's view that joint ventures should not be on-going entities, but rather something formed for a limited purpose with a limited duration
- 13 C.F.R. § 124.513(c) Contents of joint venture agreement.
 - “Every joint venture agreement to perform an 8(a) contract” must contain a provision...



Joint venture agreements: required contents

- (1) Setting forth the **purpose** of the joint venture;
- (2) Designating an **8(a) Participant as the managing venturer** of the joint venture, and designating a named employee of the 8(a) managing venturer as the manager with ultimate responsibility for performance of the contract (the “Responsible Manager”).
- (3) Stating that with respect to a separate legal entity joint venture the **8(a) Participant(s) must own at least 51%** of the joint venture entity;
- (4) Stating that the 8(a) Participant(s) must receive profits from the joint venture **commensurate with or exceeding the work performed by the 8(a) Participant(s)**;
- (5) Providing for the establishment and administration of a **special bank account in the name of the joint venture**.
- (6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical.
 - [Again, think limited purpose *i.e.*, procurement-specific]



Joint venture agreements: required contents

- (7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements . . . where practical.
 - [More on the performance of work requirements in a minute]
- (8) Obligating all parties to the joint venture to ensure performance of the 8(a) contract and to complete performance despite the withdrawal of any member;
- (9) Designating that **accounting and other administrative records** relating to the joint venture be kept in the office of the 8(a) Participant managing venturer (waiver from District Director possible);
- (10) Requiring the **final original records** be retained by the 8(a) Participant managing venturer upon completion of the 8(a) contract performed by the joint venture;
- (11) Stating 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
- (12) Stating 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.



And what happens if the JVA does not meet these requirements?

- A JVA which fails to contain the required terms can result in a finding of **affiliation between the joint venture partners**, rendering the joint venture ineligible for award
- There has been an uptick in size protests (as SBA expected) of JV arrangements on this basis...



JV not eligible for exemption from affiliation

- *DSC-EMI Maintenance Solutions, LLC, Native Energy & Technology, Inc.*, SBA No. SIZ-6096 (May 2021) (affirming Area Office determination that JVA did not comply with requirements for such agreements because it **failed to identify the responsibilities of the parties for providing an important component of the work on the contract resulting from the solicitation**)
 - Therefore, joint venture not eligible for the exemption from affiliation afforded qualified joint ventures under 13 C.F.R. § 121.103(g)
- *KTS Solutions, Inc.*, SBA No. CVE-146-P (Feb. 2020) (finding JVA did not meet the requirements of 13 C.F.R. § 125.18(b)(2)(vi) and (vii) because the agreement **failed to itemize equipment** to be used in performance of the contract; **did not specify the parties' responsibilities** regarding contract negotiation, source of labor, and performance; and **omitted any description of the tasks that each JV member would perform** on the contract, or which employees of each member would perform those functions)
 - Contents of a JV agreement particular to an IDIQ effort



Joint venture agreements: draft and UPDATE as required

- So, be sure to take the time to draft & update JVAs, as required, & be prepared to show that the JVA meets SBA's requirements
- *See, e.g., Klutina River Contractors, SBA No. SIZ-6117 (Aug. 2021)* (finding joint venture agreement did set forth a specific purpose of the JV (13 C.F.R. § 125.8(b)(2)(i)) and did itemize all major equipment, facilities, and resources (13 C.F.R. § 125.8(b)(2)(vi)) & thus Area Office clearly erred in finding joint venture partners affiliated on this basis)



Performance of work

- The joint venture must perform the applicable percentage of work per the limitation on subcontracting requirement
- The protégé firm must perform 40% of joint venture's work
 - Calculation of the protégé's 40% follows the same rules as in § 125.6, including exclusion of the same costs from the limitation on subcontracting calculation
 - E.g., cost of materials excluded from the calculation in construction contracts
- Work performed by a similarly situated entity **will not count** towards the protégé's 40% – the protégé itself must perform 40% of the joint venture's work



Performance of work

- Simplifying the analysis – start with the limitation on subcontracting requirement
 - For a \$10 million services contract, the joint venture can subcontract up to 50% (\$5 million) to non-similarly situated entities; work subcontracted to similarly situated entities continues to be excluded from the analysis
 - E.g., if a similarly situated subcontractor is going to perform \$2 million of the required services, then the joint venture must perform \$3 million of the required services to get to \$5 million (or 50% of the contract)
- Then calculate the protégé's workshare
 - Of the \$3 million to be performed by the joint venture, the protégé firm itself must perform at least 40% (or \$1.2 million)
 - Cannot subcontract any of the \$1.2 million (even to similarly situated entities)



Joint ventures: experience & past performance

- Procuring agencies are prohibited from requiring the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally
 - 13 C.F.R. § 125.8(e)
 - Requires agencies to consider the **separate experience** of the JV members in determining whether the JV meets the solicitation's requirements
- “The reason that any small business joint ventures with another business entity, whether a mentor-protégé joint venture or a joint venture with another small business concern, is because it cannot meet all performance requirements by itself and seeks to gain experience through the help of its joint venture partner.”
 - Unreasonable to require the protégé firm itself to have the same level of past performance and experience (either in \$, # of contracts performed, years of experience, or otherwise) as its large business mentor
 - Solicitation provisions requiring protégé & mentor to have the same level of past performance = unreasonable & should be permitted



Joint ventures: experience & past performance

(e) **Capabilities, past performance and experience.** When evaluating the capabilities, past performance, experience, business systems and certifications of an entity submitting an offer for a contract set aside or reserved for small business as a joint venture established pursuant to this section, *a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously.* A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.



So what does this mean, practically?

- If the terms of a solicitation attempt to restrict the agency's evaluation of JV's capabilities, past performance, and/or experience to the JV itself OR to the protégé member of the JV
→ **consider filing a pre-award protest**
 - See, e.g., *Innovate Now, LLC*, B-419546 (Apr. 2021) (sustaining protest challenging solicitation requirement that protégé members of a joint venture have the same level of experience as other offerors)
 - *Computer World Services Corp.*, B-419956.18 (Nov. 2021) (sustaining protest challenging solicitation terms that restricted the number of experience examples that may be submitted by a large business mentor)



One last point on JVs: facility clearances

- Previously, some procuring agencies would not award a contract requiring a facility clearance to a JV if the JV itself did not have a clearance (even in instances where both JV partners individually had such clearances)
 - SBA found such a restriction inappropriate
- Now, a JV may be awarded a contract requiring a facility security clearance **where either the JV itself or the individual partner(s) to the JV that will perform the necessary security work has (have) a facility security clearance**
 - 13 C.F.R. § 121.103(h)(4)



Again, what does this mean practically?

- Aside from allowing for more competition from JVs, the rule provides a basis for JVs to file a **pre-award protest** if the terms of a solicitation attempt to require the JV itself to hold a facility clearance
- *See, e.g., InfoPoint LLC, B-419856 (Aug. 2021)* (sustaining pre-award protest challenging requirement that **joint venture** hold a top secret facility clearance as opposed to the **joint venture's members**)



THE FUTURE OF THE ASMP PROGRAM -- *WHAT COULD POSSIBLY GO WRONG?*



Mentor Protégé Trends

- SBA applied some lessons learned from the 8(a) mentor-protégé program in crafting the ASMP program.
- Even then, there will be participants who break the rules and imbalance of benefits can lead to deals that appear to abuse the SBA procurement programs.
- Now that M-P Arrangements are maturing expect:
 - Compliance and Enforcement Actions
 - Disputes between Mentors and Protégés
 - Oversight
 - More scrutiny of Applications and Annual Updates
 - Protests



- Experience in the 8(a) MP showed issues and disputes arose for many reasons, including
 - Mentors only interested in JVs and exploiting the protégé's status
 - Protégés failing to live up to their end of the bargain, or worse, threatening their mentors
 - Good old fashioned business disputes
- Oversight and Compliance issues stemmed from these disputes but also
 - Optics of mentors receiving large set-aside awards through JVs
 - Impact on agency small business goaling
 - Protests
 - Whistleblower Reports



CASE STUDY 1

- A Mentor Protégé agreement calls for the mentor to provide technical assistance, BD assistance, and management assistance.
- During the course of performance of a contract by the MP JV, the protégé informs the mentor that it cannot make payroll and asks the mentor for a loan.
- The mentor, concerned about the impact on the JV's contract performance and wanting to “do the right thing” makes a loan to the protégé.

What's wrong with this scenario?



CASE STUDY 1, cont'd.

- The protégé asks for more loans from the mentor, and the mentor initially obliges, but then the mentor puts its foot down and demands repayment of the loan or alternatively that its loans be converted to an equity interest in the protégé.
- The protégé threatens to go to SBA and expose the mentor for “abusing” the protégé.
- The Mentor-Protégé Agreement makes no provision for loans or financial assistance (affiliation!)

What should the mentor do?



CASE STUDY 2

- SBA approves a MP Agreement between a mentor which is part of a large conglomerate and a small business protégé.
- In the course of performance, the protégé discovers that its mentor has a sister company which has three other protégés.
- The protégé is concerned that the mentor is directing opportunities to its affiliate and its protégés.

What should the protégé do?

***Query:* is a Mentor-Protégé Agreement enforceable in court as between the parties (i.e. outside of SBA's administrative oversight purview)?**



Questions?





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