SDVOSB JOINT VENTURES and MENTOR PROTÉGÉ JV's

What Every SDVOSB Government Contractor Should Know!!!

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Overview

- SBA "All Small" Mentor Protégé Program Fundamentals
- SBA Joint Venture Fundamentals
- Mentor Protégé Program for SDVOSBs
- SDVOSB Joint Venture Considerations
- Recent Regulatory Changes/Key Compliance Requirements
- Questions

Disclaimer

- The following presentation is for informational and educational purposes only and does not constitute legal advice. For legal advice on specific situations and circumstances, please contact an attorney familiar with federal Government Contracting and Small Business/SDVOSB regulations and consider contacting ReavesColey PLLC.

SBA All Small Mentor Protégé Program Fundamentals

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SBA All Small Mentor Protégé Program Fundamentals

- The SBA's "All Small" Mentor Protégé Program is the only program in federal government contracting that allows a LARGE BUSINESS to Joint Venture with a SMALL BUSINESS for a set-aside procurement
  - So this is VITALLY important BOTH for small and large businesses
- In other words, the ONLY WAY that a SDVOSB can Joint Venture with a Large Business on a SDVOSB set-aside opportunity is for there to be a Mentor Protégé Agreement in place and approved by the SBA PRIOR to submission of the bid/proposal by the Joint Venture

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SBA All Small Mentor Protégé Program Fundamentals, cont.

- The “All Small” Mentor Protégé Program also allows the Mentor to provide various types of assistance to the Protégé WITHOUT triggering a finding of affiliation. For example:
  - Contracting Assistance, Business Development Assistance, General & Administrative Assistance, Financial Assistance, & Management/Technical Assistance

- Mentors may (but are not required to) obtain up to a 40% ownership interest in their Protégé in exchange for a capital infusion without affiliation concerns

SBA Joint Venture Fundamentals

SBA Joint Venture Fundamentals

- Recall, only a Joint Venture between an SBA-approved Mentor and Protégé is permitted to bid on a set-aside procurement where one party is a LARGE BUSINESS under the NAICS Code assigned to the procurement

- However, as long as both businesses are SMALL under the NAICS Code assigned by the procurement, two small businesses or SDVOSBs (or an SDVOSB and a small business) can Joint Venture for any small or SDVOSB set-aside procurement
    - As we will explain, the Managing Member/Lead Member of the JV is required to be a SDVOSB for a SDVOSB set-aside procurement

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SBA Joint Venture Fundamentals, cont.

- VITALLY important ADVANTAGE of SBA/SDVOSB Joint Ventures
- SBA Regulations REQUIRE Contracting Activities to accept the past performance/experience of BOTH Joint Venture members as being credited to the Joint Venture
  - When evaluating the capabilities, past performance, experience, business systems and certifications of [a JV], a procuring activity **must consider work done and qualifications held individually by each** [JV partner] 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** [requirements of other offerors]. **The partners to the joint venture in the aggregate** must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.

Joint Venture Fundamentals, etc.

- The SBA recently CHANGED the rules which apply to BOTH Mentor Protégé Joint Ventures and SDVOSB/Small Business/set-aside Joint Ventures, greatly increasing their utility
- The former “3 in 2” rule has been eliminated, and now Joint Ventures (once created) are permitted to obtain an UNLIMITED number of contract awards during a two (2) year period starting with the first award (more on this later)
- There appears to be increasing recognition by Government Agencies that Joint Ventures (including SDVOSB Joint Ventures) are able to perform on much larger set-aside procurements appears to have led to larger and larger set-aside opportunities

Mentor Protégé Program for SDVOSBs

SDVOSB Mentor Protege

- The SBA says that the purpose of the "All Small" Mentor Protégé Program (which includes SDVOSBs) is to require "approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts." (i.e., the SBA sees this as a business development program)
- More specifically, this assistance may include:
  - Technical and/or Management assistance;
  - Financial Assistance (equity invest., lines of credit, loans, bonding, etc.);
  - Trade Education;
  - Business Development;
  - General and Administrative and/or
  - Contracting assistance in performing prime contracts through JV arrangements OR subcontracts (from M to P or P to M)

SDVOSB MP, cont.

- Notice, that many of these areas of assistance that Mentors are permitted to provide to Protégé's might otherwise cause a finding of AFFILIATION
- HOWEVER, the Mentor Protégé regulations create a specific exception from a finding of affiliation "based solely on the mentor-protégé agreement or any assistance provided pursuant to the agreement." 13 CFR 125.9(d)(4) – but affiliation is still possible . . .
- Recent updates to the SBA's form Mentor Protégé Agreement demonstrate that the SBA is now focusing on whether affiliation ALREADY EXISTS between a Mentor and Protégé BEFORE deciding to approve the MPA and provide an exception to the affiliation rules

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Mentor Eligibility

- Under 13 C.F.R. 125.9(b), Mentors must be "for-profit" entities, that are small but can also be "other than small" (i.e., LARGE) and must:
  - Demonstrate a commitment and the ability to assist small business concerns in order to receive benefits of the Mentor Protégé Program
- A Mentor must also demonstrate that it:
  - Is capable of carrying out its responsibilities to assist the protégé under the proposed Mentor-Protégé agreement;
  - Possesses good character and does not appear on the federal list of debarred or suspended contractors; and
  - Can impart value to a protégé due to lessons learned and practical experience gained or through its knowledge of general business operations and government contracting (does NOT have to be a SDVOSB program graduate for an SDVOSB protege)

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Multiple Protégés

- Under 13 C.F.R. 125.9(b)(4), generally, Mentors will have no more than one (1) Protégé at a time.
- However, SBA may authorize a business to Mentor more than one (1) Protégé where it can demonstrate that the additional Mentor Protégé relationship will not adversely affect the development of either Protégé (i.e., the second firm may not be a competitor of the first firm – for example, not two (2) SDVOSB's in the same geographic area).
- Under no circumstances will a Mentor be permitted to have more than three (3) Protégés at one time

<u>SDVOSB Protégé Eligibility</u>

- A SDVOSB Protégé must be SMALL under its primary NAICS Code
- Where an SDVOSB is "other than small" for its primary NAICS code and seeks to qualify as a small business in a secondary NAICS code, the firm must demonstrate how the Mentor Protégé relationship is a logical business progression for the firm and will further develop or expand current capabilities.
- <u>***Importantly, SBA will NOT approve a Mentor Protégé relationship in a secondary NAICS code in which the firm has no prior experience.***</u>
- The SBA will review the SDVOSB's profile at www.sam.gov to confirm the SDVOSB status of the Protégé
- We are awaiting NEW regulations regarding the transfer of SDVOSB Verification from the Center for Verification and Evaluation (CVE) at the VA to the SBA (slated to be effective in early 2023). At that point, SBA-certification <u>***may be***</u> required for SDVOSB Mentor Protégé participation (by the Protégé)

Multiple Mentors

- Under 13 C.F.R. 125.9(c)(2), a Protégé may generally only have one (1) Mentor at a time (and only two (2) total MPA's during its lifetime)

- However, SBA may approve a second mentor for a particular Protégé where the second relationship will not compete or otherwise conflict with the assistance set forth in the first Mentor-Protégé relationship, AND:

  - (i) The second relationship pertains to an unrelated NAICS code; OR

  - (ii) The Protégé is seeking to acquire a specific expertise that the first mentor does not possess.

Application Procedure

- *SBA Certification Portal for MPA – www.certify.sba.gov*

Application Procedure

- Both applicants (M & P) must FIRST be registered in the System for Award Management (SAM) – www.sam.gov
  - SAM Registration MUST include Primary and any Secondary NAICS Code
- Required Documents from Protégé:
  - Certificate of completion for viewing the Mentor-Protégé Program training module
  - Completed Business Plan (suggest using SBA Form 1010C)
    - https://www.sba.gov/managing-business/forms/small-business-forms/8a-business-development-forms/8a-business-plan
  - Copies of any other active Mentor Protégé Agreements (if applicable)
  - ***Mentor Protégé Agreement signed by BOTH Mentor and Protégé***

Written Agreement

- Under 13 C.F.R. 125.9(e), the Mentor and Protégé MUST enter into a written agreement setting forth an assessment of the Protégés needs and ***providing a detailed description and timeline*** for the delivery of the assistance the Mentor commits to provide to address those needs
- The SBA has provided a FORM Agreement that addresses all the potential areas of assistance (this form has been recently updated)
  - i.e., management and/or technical assistance, loans and/or equity investments, cooperation on joint venture projects, or subcontracts under prime contracts being performed by the mentor

Written Agreement, cont.

All Small Mentor-Protégé Program Mentor-Protégé Agreement

Between

[ABC (Proposed Protégé)]

And

[XYZ (Proposed Mentor)]

This Mentor-Protégé Agreement ("Agreement") is between [**ABC** (Proposed Protégé)], a _____________ [insert type of entity] authorized to conduct business in the State of ________ [insert State of incorporation] with its principal place of business at [Address], and [**XYZ** (Proposed Mentor)], a _______ [insert type of entity] authorized to conduct business in the State of ________[insert State of incorporation] with its principal place of business at [Address] (collectively referred to as the "Parties").

WHEREAS, [**ABC** (Proposed Protégé)] is a small business under primary North American Industry Classification System (NAICS) code [*Provide your primary NAICS code. If you are seeking a mentor-protégé relationship in a secondary NAICS code, add a sentence explaining why and describing any work performed and your experience in that code.*] [ABC (Proposed Protégé)] specializes in providing [*Provide a brief description of the proposed Protégé's technical capabilities. If you are seeking a mentor-protégé relationship in a secondary NAICS code, add a description of your capabilities in performing work in your secondary code.*].

WHEREAS, [**XYZ** (Proposed Mentor)] is a [*Provide the Proposed Mentor's business structure (e.g. corporation, limited liability company, etc.*)] with a history of providing [*Provide a brief description of the Mentor's technical capabilities and contracting history, especially with the Federal Government*].

WHEREAS, the Parties wish to formalize a mentor-protégé relationship between [**ABC** (proposed Protégé)] and [**XYZ** (proposed Mentor)] under the U.S. Small Business Administration's ("SBA") Mentor/Protégé Program established pursuant to 13 C.F.R. §125.9; and

Written Agreement Form

- FORM SBA Mentor Protégé Agreement for ALL SMALL Mentor Protégé Program
  - https://www.sba.gov/document/support--all-small-mentor-protege-program-mentor-protege-agreement-template
  - We can also email the SBA form (pdf)
- Ideally, the assistance identified in the MPA will be closely tied to (and will specifically cross-reference) the business development goals of the Protégé as set forth in the Protégé's Business Plan (which can be based on the SBA Form 1010C)
  - https://www.sba.gov/managing-business/forms/small-business-forms/8a-business-development-forms/8a-business-plan

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Period of MPA

- SBA will review the Mentor Protégé Agreement annually to determine whether or not to approve for another year (submission within 30 days of anniversary of approval required)
  - HOWEVER, unless rescinded in writing as a result of the review, the Mentor Protégé relationship will automatically renew without additional written notice of continuation
- The Term of the Mentor-Protégé Agreement may not exceed six (6) years
- If an initial term was for less than six (6) years, the parties may extend the term by mutual agreement provided that the total time including the extension shall not exceed six (6) total years
- HOWEVER, under recent changes, if the MPA ends within 18 months, this will not count toward the two (2) total MPA's a Protégé can have) – but the SBA will not allow this exception to be "abused"

<u>Joint Venture Program for SDVOSBs</u>

JV Refresher

- Under FAR 9.601 BOTH JVs and Teaming Agreements are considered "Teaming Arrangements"
- High Level - Teaming Agreements vs. JVs
  - Teaming Agreement – only ONE party with direct contractual privity with the Government (Prime-Sub)
    - No enforcement rights between Subcontractor and the Government
  - Joint Ventures – BOTH parties have contractual privity with the Government
    - Enforcement rights between parties governed by the JV Agreement and there are enforcement rights between BOTH contractors and the Government

Joint Ventures

- A JV is an entity (typically incorporated, but unincorporated technically permitted) separate from its members but made up of its members
- The JV entity is the offeror/bidder to government
- You can think of each JV partner as being a "super" subcontractor of the JV entity
- Under current Joint Venture Regulations, only unpopulated JV's (populated = with employees)
  - No employees "performing work" under the Contract
  - JV members are each essentially "subcontractors" to the JV

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Joint Ventures, cont.

- Under 13 C.F.R. 121.103(h), an unincorporated JV is an "Informal" JV, and a written Agreement will provide the rights and responsibilities of the Joint Venturers
  - These have all but disappeared because of the www.SAM.gov registration requirement
- An incorporated JV is almost exclusively set up as a Limited Liability Company (LLC) with each of the Joint Venturers as members/owners
- In either case, a Joint Venture must be in writing, must do business under its own name, and must be identified as a joint venture in the System for Award Management (SAM) at www.SAM.gov (i.e., must have its own DUNS number and Cage code)

JV Benefits (for ALL JV's)

- Unlike a Teaming Agreement, the JV entity can be set in place and cover multiple RFPs and contracts
- The management, control, and profit/loss distribution issues usually get addressed up front (and can be shared to an extent)
- More certainty in terms of enforceability/work-share between JV Partners
- Government Benefit – Government/Agency is able to "reach out and touch" both the "prime" and "sub" by virtue of the JV structure (privity with BOTH entities)
- **Revenue Split helps SDVOSBs and other small businesses manage their size (Small Business Prime does not catch all revenue)**

JV Drawbacks

- Joint Ventures provide for the sharing of profits AND losses, so subcontractor/JV partners cannot limit their losses in the same way as in a traditional Prime-Sub relationship
- More costs involved with setting up
  - Legal fees (JV Agreement/Operating Agreement)
  - Legal formation of a new entity (for separate entity JV)
  - Business License (revenue tracking)
  - Tax filings
  - Some ongoing costs/logistics to maintain registrations
  - FCL Issues
- In firm-fixed price (FFP) setting, can be difficult to agree on definition of “costs” for purposes of splitting profits and losses

Updated SBA JV Regulations

- The so-called 3 in 2 Rule has been ELIMINATED, but . .
- Two (2) years is still important for timing
- The FIRST award to the JV starts the 2-year time clock running.
  - This INCLUDES any contract NOVATED to the JV
- The JV can win as many awards as possible within that 2-year period, but you CANNOT submit any other bids/proposals after the 2-year anniversary of your first award

SBA Regulations on Set-Aside JV's

- The SBA has specific regulations governing JV's for Small Businesses including not just SDVOSBs, but also 8(a)'s, WOSBs/EDWOSBs, HUBZone's (CURRENTLY, the VA certifies JV's for SDVOSB/VOSB verification)
  - IMPORTANTLY, these regulations apply to MP JV's as well as set-aside JV's

- Here are the specific regulations:

  - 13 CFR 125.8 – Small Business JV (only MP small business JVs)
  - 13 CFR 124.513 – 8(a) JV (as of November 16, 2020, ONLY requires SBA approval for sole source awards to JVs)
  - **13 CFR 125.18 – SDVOSB JV**
  - 13 CFR 126.616 – HUBZone JV
  - 13 CFR 127.506 – WOSB/EDWOSB JV
  - **38 CFR 74 – SDVOSB CVE JV (requires CVE Verification, requires separate entity)**

SBA Regulations on Set-Aside JV's, cont.

- Extremely important to comply with JV Requirements for Specific Set-Aside Programs (i.e., SDVOSB) – otherwise, JV will be susceptible to a size and/or a status protest
- Additionally, under contracts awarded to an SDVOSB MPA JV or SDVOSB JV (as as well as to other set-aside JV's) (13 C.F.R. 125.8), there is a significant Certification of Compliance requirement:
  - ***Prior to PERFORMANCE of any set aside contract by a Mentor Protégé JV*****,** the small business partner to the JV MUST submit a written certification **to the Contracting Officer AND to the SBA signed by both the Mentor and Protégé** stating that the parties have entered into a JV Agreement that fully complies with the applicable regulations AND that the parties will meet the performance of work requirements

Joint Venture Agreement Specifics

- Importantly, neither MPA SDVOSB Joint Ventures nor SDVOSB Joint Ventures are required to be approved at any time by the SBA
- However, remember the Certification of Compliance that is required be submitted to the Contracting Officer and the SBA prior to performance (but after award)
  - IMPORTANT: Your Mentor Protégé Agreement DOES have to be pre-approved by the SBA before submission of JV proposal between a SDVOSB and a Large Business
- As noted, there are different regulations for each set-aside category (Small, SDVOSB, WOSB/EDWOSB, HUBZone), but the regulations are very similar across all programs

Joint Venture Agreement Specifics, cont.

- **Specific Requirements** - Joint Venture Agreements MUST:
  - State that the SDVOSB (or small business/set-aside category member) owns at least 51% of any incorporated entity JV
    - **Profits are to be distributed “commensurate” with work performed (not ownership) under 13 CFR 125.18(b)(2)(iv)**
    - **HOWEVER, under recently updated regulations, the small business protégé can receive MORE profits than the work percentage performed (if the parties agree), BUT the other JV partner’s profit is capped at % of performance**

Joint Venture Agreement Specifics, cont.

- Joint Venture Agreement MUST (cont.):
  - Itemize all major equipment, facilities, and other resources to be furnished to each party to the JV, with a detailed schedule of the value of each
    - If contact is indefinite in nature (IDIQ), JV should set forth the anticipated equipment, facilities, and resources
  - Specify the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including way that the parties to the JV will ensure that the small business (or set aside category member) will meet the performance of work requirements
    - Again, if contact is indefinite in nature (IDIQ), JV should set forth the anticipated equipment, facilities, and resources

Joint Venture Agreement Specifics, cont.

- Joint Venture Agreement MUST (cont.):
  - Joint Venture Agreements will typically utilize contract-specific addendums to fulfill the requirement to itemize equipment, facilities, and resources, and to designate responsibilities of the party (e.g., contract negotiation, source of labor, etc.)
  - Extremely important to ensure the addendums include the required details and are fully drafted and executed prior to proposal submission!
    - 2019 SDVOSB Status Protest – SDVOSB JV found INELIGIBLE where its "addendum" was merely a list of contracts under which the JV intended to submit proposals, and the JV parties failed to update and execute an addendum setting forth the specifics outlined above (i.e., the contract award was LOST!)

JV Performance of Work Requirement

- For any Small Business (or other set-aside category) JV, ***the small business MUST perform as least 40% of the work performed by the Joint Venture*** (this is NEW, previously this requirement only required to 8(a) Joint Ventures)
  - ***Recently updated regulations clarify that this 40% CANNOT be met by a similar situated entity***
  - ***This should NOT be confused with the Limitation on Subcontracting/ the JV's self-performance requirement as a whole***
- The work performed by the SDVOSB MUST be more than administrative or ministerial functions so that it gains substantive experience
  - The amount of work done by the JV partners will be aggregated, and the work done by the small business (or other set-aside category) must be 40% of the total done by the partners
  - In determining compliance, the work done by a Mentor and any "affiliate" of the Mentor at any subcontracting tier will be counted

<u>Limitation on Subcontracting/ Self-Performance Requirement</u>

- **<u>Generally applies to work performed by JV as a whole</u>**
- The applicable limitation on subcontracting rules have DIFFERENT PERCENTAGES for contracts based on whether they are for services, supplies, construction, or specialty trade construction
- Generally speaking, the percentage measures compliance based on REVENUE RECEIVED by the JV (in this case) with some narrow exceptions
  - Based on a Percentage of TOTAL CONTRACT VALUE
  - Ability to subcontract to “Similarly Situated” entities

Limitation on Subcontracting/ Self-Performance Requirement, cont.

- "Similarly situated entity" is a subcontractor that has the same small business program status as the prime contractor.
- This means that: For a SDVOSB requirement, a subcontractor that is a qualified SDVOSB. 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 assigns to the subcontract the subcontractor will perform.***
  - ***REMEMBER this rule CANNOT help a SDVOSB Protégé meet the 40% performance requirement measured by work done by the JV partners in the aggregate (performance of work is different than the L.O.S.)***

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Initial Certification Requirement for ALL SDVOSB JVs (except small non-MPA JVs)

- **Certification of Compliance**

- PRIOR to the **performance** of any contract set aside or reserved for small business by a JV between a protégé small business and a mentor [as well as 8(a), SDVOSB, WOSB/EDWOSB, and HUBZone JVs], the small business partner to the joint venture **must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:**

- (1) The parties have entered into a joint venture agreement that fully complies with [the specific JV requirements based on specific JV type]; AND;

- (2) The parties will perform the contract ***in compliance with the joint venture agreement and with the performance of work requirements*** set forth in [13 C.F.R. 125.6 and the 40% performance of work requirement]

Annual and Completion Reporting for ALL SDVOSB JVs (except small non-MPA JVs)

- For SDVOSB MPA JVs and all other SDVOSB JVs, the SDVOSB partner to the JV must annually submit a report to the relevant Contracting Officer AND to the SBA signed by an authorized official of each JV member explaining how the performance of work requirements are being met on each contract being performed by the JV

- At the completion of every contract (performed by a SDVOSB MPA JV or a SDVOSB JV), the SDVOSB partner to the JV must submit a report (same as above) explaining how and certifying that the performance of work requirements were met for the contract, and certifying that the contract was completed in accordance with the JV Agreement

Past Performance of JVs

- Previously, there was some confusion about government evaluation of past performance of a newly-formed Joint Venture entity that had no past performance or experience as a Joint Venture
- As noted earlier, under recently updated JV regulations, **when evaluating the capabilities, past performance, experience, business systems and certifications of [a JV], a procuring activity must consider work done and qualifications held individually by each [JV partner] 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 [requirements of other offerors]. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems and certifications necessary to perform the contract.**

Recertification, and JV Recertification

- If the JV, or one of the JV partners, is going through M&A activity (or may go through M&A activity), there have been some significant clarifications/changes in the regulations regarding recertification of size AFTER M&A
- For JV’s, since November 16, 2020, only the JV partner that went through M&A activity must provide the size recertification required within 30 days of transaction closing
  - NOTE: If the M&A activity causes the JV to lose its SDVOSB/small business/socio-economic status, there is potential uncertainty as to eligibility for future options and task orders for the JV

QUESTIONS???

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