

“Small Business Joint Ventures and
Subcontracting:

New Thinking to Compete for Larger
Federal Contracts”



What we are covering

1. ✓ SBA definition of a *small business joint venture*
2. Size standards, *affiliation*, and exceptions
3. *Limitations on subcontracting* and *ostensible subcontracting*
4. Types of small business set-asides, unrestricted competition and joint ventures
5. Mentor protégé and 8(a) exception
6. What next?



It is the policy of the Government
to place a **fair proportion** of its acquisitions with:

1. Small business,
2. Small disadvantaged business (SDB and 8(a)),
3. Women-owned,
4. HUBZone (Historically Underutilized Business Zone) small business and,
5. Service disabled veteran-owned business concerns (SDV).

- Small Business Act

But contracts get larger



The fair proportion? Small Business Act goals:

(Double counting)

	Goal (\$)
1. Small Business	23%
2. Small disadvantaged business (8(a) small business	5%*
3. Women-owned small businesses	5%
4. HUBZone (Historically Underutilized Business Zone) small business	3%*
5. Service-disabled veterans (SDV) small business	3%

* Go for it: SBA certifications **defined:**

<http://www.sba.gov/services/contractingopportunities/contracting/index.html>

More to come on “Self-certification”



Just what is a **small business joint venture (JV)**? **SBA definition:**

- ◆ An association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied,
- ◆ consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period (“3-2 rule.”
- ◆ combining efforts, property, money, skill, or knowledge,
- ◆ but not on a continuing or permanent basis for conducting business generally.



SBA size regulations: (13 CFR 121.103(h))



And furthermore -

A joint venture –

- ❖ Represents the formation of a new small business
- ❖ Consists only of small businesses
- ❖ Self-certifies that it is “small”
- ❖ Is subject to the regulations as they govern small business – just like any other small business
- ❖ Is reviewed by the contracting officer, not SBA. (Except for 8(a)).



When do you think small business joint venture?

Set-asides. Where ever small business or a type of small business would compete

1. Small business set-asides
2. 8(a) set-asides
3. HUBZone set-asides
4. SDV set-asides

More to come

End of part 1



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Are you small for a particular acquisition?

(Self-certification)

- ❖ NAICS (North American Industry Classification System) code for the acquisition
- ❖ SBA size standard: Three year average annual revenues
- ❖ SBA size standard: Number of employees over the last 12 months



Finding NAICS code descriptions at the Census:
<http://www.census.gov/epcd/naics02/naicod02.htm>

Finding size standards for a NAICS code at SBA:
<http://www.sba.gov/size/sizetable2002.html>

(Both websites above contained and explained at:
<http://www.ccr.gov/SizeStandard.aspx>)

The plot thickens: “Affiliation”



“Affiliation” with others: Who is in control?

Others have power to control your business through:

- ❖ Common management
- ❖ Identical business interests
- ❖ Common stockholders
- ❖ Ownership of multiple businesses
- ❖ Contractual relationships
- ❖ Joint venture arrangements (for that “new small business”)

You are not viewed as being totally independent



So what? For both small businesses and small business joint ventures:

- So you self-certify your JV is a small business.
- Combine total revenues or employees determine size.
- You may be a large business.
- So you are ineligible to compete for set-asides individually or as a joint venture.

SBA size regulations at 13 CFR 121.103) and
13 CFR 121.103(h)(2)



Case 1: Small business JV and affiliation

- ◆ Small business set aside
- ◆ Environmental consulting services NAICS: 541620
- ◆ *Revenue-base size standard:* \$6.5 million
- ◆ *Estimated value of contract award:* \$3.0 million

- ◆ Joint venture firms are affiliated
 1. Small business A: \$3.5 M average annual receipts
 2. Small business B: \$3.5 M average annual receipts

- ◆ *Can firms with combined receipts of \$7 million compete as a small business joint venture for the set-aside?*

- ◆ No. Joint venture exceeds the revenue-based size standard, is not a small business for this code, and so it cannot compete.



But there are exceptions to most rules:

Size regs at 13 CFR 121.103(h)(3):

1. Where the procurement is too large for small business to compete. (Bundling).
2. Large procurements - size standards:
 - (a) Greater than half of the size of the revenue-based size standard.
 - (b) Over \$10 million for employee-based size standard.



Case 2: Small business JV with an exception to affiliation



- ◆ Small business set aside
- ◆ Environmental consulting services NAICS: 541620
- ◆ *Revenue-based size standard:* \$6.5 million.
- ◆ *Estimated value of contract award:* \$4.0 million.

- ◆ *Joint venture firms are affiliated*
 1. Small business A (Must be a small business)
 2. Small business B (Must be a small business)

- ◆ *Can these small firms compete as a small business joint venture for the set-aside?*

- ◆ **Yes.** Joint venture may compete for the small business set-aside because the contract size is greater than half of the revenue-based size standard



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Joint ventures vs. subcontracting

As a regular small business Federal prime contractor:

- ◆ You can only subcontract so much of a set-aside
- ◆ Only the prime is on the line for contract performance

As a small business joint venture Federal prime contractor:

- ◆ You can only subcontract so much of a set-aside
- ◆ Joint venturers are on line for contract performance
- ◆ Has larger capacity - resources





Limitations on subcontracting apply to small businesses and small business joint ventures too

FAR clause 52.219-14

Services Provide 50% of personnel costs	Supplies Provide 50% of cost of manufacturing, excluding materials
General Construction Perform 15% of cost of contract with own employees, excluding materials	Special Trade Construction Perform 25% of cost of contract with own employees, excluding materials



SBA Certificate of Competency: 13CFR125.5



“Affiliation again:” Subcontractor control?

- ❖ Unusual reliance. Subcontractor that performs primary and vital requirements or a subcontractor upon which the prime contractor is unusually reliant.
- ❖ Affiliated? Subcontractor is treated as an affiliate so revenues or employees are combined to determine size. (SBA size regs at 13 CFR 121.103(h)(4)).
- ❖ Refer to SBA: If so for an apparent low offer, referral is made to SBA per FAR 19.302.
- ❖ Do not do this





Does the subcontractor have control? “Ostensible subcontractor affiliation” factors

1. Who will manage the contract?
2. Which party possesses the requisite background and expertise to carryout contract?
3. Who “chased” the contract?
4. What degree of collaboration was there on the bid?
5. Are there discrete tasks to be performed or is there a commingling of personnel and materials?
6. What is the relative amount of work to be performed by each?
7. Which party performs the most complex and costly contract functions



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1. Set-asides for small business and small business joint ventures – and all types of small business

- ◆ JV must be in CCR
- ◆ JV consists of small firms only.
- ◆ Affiliation exceptions for large procurements. Ostensible subcontractor scrutiny, and subcontracting limitations apply.
- ◆ No small business set-asides for construction per FAR 19.10 except for 8(a), HZ or SDVs.



2. 8(a) sole source or competitive

- ◆ Competes only for 8(a) procurements.
- ◆ 8(a) firm must manage and furnish employee project manager.
- ◆ 8(a) firm must earn at least 51% of profits.
- ◆ At least one firm is 8(a) certified and less than one half the size standard corresponding to the NAICS code assigned to the contract.

8(a) regs at 13 CFR 124.513

8(a) JV resource website: http://www.sba.gov/dc/DC_8AJV.html



3. HUBZone

- ◆ JV consists of HZ firms only.
- ◆ At least 50% of the cost of personnel must be performed by HUBZone firms. 13 CFR 126.700
- ◆ See FAR 52.219-3: Notice of Total HUBZone Set-Aside



4. Service-disabled vet

- ◆ JV formed per regs with SDV managing partner.
- ◆ SDV receives at least 51% of profits.
- ◆ See FAR 52.219-27: Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside



Compete in unrestricted competition

1. **Small business:**

- ◆ Small business JV with small firms only
- ◆ Not subject to limitations on subcontracting
- ◆ Ostensible subcontracting scrutiny applies
- ◆ Affiliation depends upon the size of the contract

2. **HUBZone JV**

- ◆ Consists of HZ firms only
- ◆ May be eligible for 10% price evaluation preference over large firms
- ◆ Subject to limitations on subcontracting, ostensible subcontracting, or affiliation scrutiny.

See FAR 52.219-4: Notice of Price Evaluation Preference for HUBZone Small Business



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End of part 4



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For SDB, HUBZones, SDVs and sometimes women-owned small businesses: Federal agency mentor-protégé programs

❖ Department of Defense:

http://www.acq.osd.mil/osbp/doing_business/index.htm

❖ Department of Homeland Security:

http://www.dhs.gov/xopnbiz/smallbusiness/editorial_0716.shtm

❖ Department of State:

<http://www.state.gov/m/a/sdbu/c14690.htm>

❖ Department of Energy:

http://smallbusiness.doe.gov/Small_Business_Programs/Mentor-Protege/mentor-protege.html

❖ Department of Treasury:

<http://www.ustreas.gov/offices/management/dcfo/osdbu/mentor-protege/>



SBA's mentor-protégé: There are exceptions to most rules

- ❖ 8(a) only
- ❖ May result in a JV with an “**other than small**” business mentor
- ❖ Competes as a small business any Federal procurement. (13 CFR 121.103(h)(3)(iii))
- ❖ 8(a) firm must manage and furnish project manager for JV.
- ❖ 8(a) firm must earn at least 51% of profits for JV.
- ❖ 8(a) mentor protégé agreement must be reviewed annually by SBA
- ❖ Small Business Administration websites:
<http://www.sba.gov/8abd/indexmentorprogram.html>
http://www.sba.gov/dc/dc_8amp.html for JV template



Summary of CFR regulations

- ❖ SBA size regulations: 13 CFR 121.103(h)
- ❖ HUBZone regs: 13 CFR 126.616
- ❖ SBA Certificate of Competency:
13CFR125.5
- ❖ Service-disabled veteran: 13 CFR 125.15(b)
- ❖ 8(a) and SDB regs: 13 CFR 124.513
- ❖ Small disadvantaged business:
13 CFR 124.1002(f)

CFR website:

http://www.access.gpo.gov/nara/cfr/waisidx_06/13cfrv1_06.html

Federal Acquisition Regulation:

<http://farsite.hill.af.mil/vffara.htm>



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End of part 5



Case 3: Small business in unrestricted DoD competition

- ◆ Industrial Building Construction code 236210
- ◆ Size standard: \$31 million
- ◆ Estimated value: \$18 million
- ◆ Affiliation excepted
- ◆ No limitations on subcontracting for small business



POSSIBLE SMALL BUSINESS BIDDER SCENARIOS:

1. Small business A bids.
2. Joint Venture B of two small businesses firms.
3. Joint venture C forms consisting of SBA 8(a) mentor-protégé consisting of an 8(a) with an “other than small” business competes as a small business.
4. Joint venture D consists of two HUBZone firms. (For HUBZones JVs claiming price 10% PEP, subcontracting limitations and ostensible subcontracting scrutiny apply.)



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Summary of small business joint venture set-asides

	Sole source	Competitive set-aside	Subcontracting limitations	Ostensible subcontracting scrutiny	Affiliation size exceptions for JVs
1. SB	No	Yes	Yes	Yes	Yes
2. 8(a)*	Yes	Yes	Yes	Yes	Yes
3. HUBZone	Yes	Yes	Yes	Yes	Yes
4. SDV	Yes	Yes	Yes	Yes	Yes

*May be MP-JV that competes for 8a or as a small business



Summary of small business joint ventures in unrestricted competition

	Unrestricted	Subcontracting limitations	Ostensible subcontracting scrutiny	Affiliation size exceptions for JVs
1. SB	Yes	No	Yes	Yes
2. 8(a) MP JV	Yes	No	Yes	Yes
3. HUBZone	Yes	Yes	Yes	Yes



What do you think?

Benefits for your business:

- ❖ Compete with larger firms.
- ❖ Combined capabilities.
- ❖ Increased access to bonding,
- ❖ Experience strategic, long-term growth.



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What do you think?

Risks:

- ❖ Finding the right joint venturers
- ❖ Creating relationships with firms
- ❖ Having the JV agreement in place



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Just what do you bring to the table?

1. What size contract can you handle alone?
2. What size of contract could you handle in a joint venture?
3. How does this fit with your business plan? (Small Business Development Centers at: <http://www.sba.gov/sbdc/>)
4. Procurement Technical Assistance Center (PTAC) assistance: <http://www.dla.mil/db/procurem.htm>



Finding out what is going on and networking

1. Target market by agency and geographic area. www.fbo.gov
2. Network at meetings of the Society of American Military Engineers <http://www.sam.org/main.php> and at presolicitation conferences.
3. Army small business specialists and more: <http://www.sellingtoarmy.info/User/Misc/SearchASBS.aspx>
4. Air Force small business specialists and more: <http://www.selltoairforce.org/Locator/locator.asp>
5. Forecasts: http://acquisition.gov/comp/procurement_forecasts/index.html



Planning for your small business JV

- ◆ Identify someone with whom you already work
- ◆ Research JV partner
- ◆ Compatibility and mutual commitment
- ◆ Communications: Understanding of expectations, review of performance, and periodic review of agreements
- ◆ Close geographic proximity



Do it right!

- ❖ Purpose and scope of agreement
- ❖ Legal organization
- ❖ Authorized representatives
- ❖ Management and performance clarity

- ❖ Handling substitution or addition of co-venturers
- ❖ Procedures for disputes
- ❖ Termination provisions



About the joint venture agreement

- ◆ Use your attorney, understand, and monitor
- ◆ Federal agency may provide special instructions for small business joint ventures in the solicitation
- ◆ Federal agency may wish to review JV your agreement



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