

LEGISLATIVE AND REGULATORY UPDATE

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NEW LEGISLATIVE & REGULATORY DEVELOPMENTS

- Subcontract reporting/executive compensation (July 8, 2010)
- Inflationary adjustments (Aug. 30, 2010)
- Small Business Jobs Act of 2010 (Sept. 28, 2010)
- Size standards review (Oct. 6, 2010)
- New WOSB program (Oct. 7, 2010)
- Veterans Benefit Act of 2010 (Oct. 13, 2010)
- HUBZone regulations (Dec. 13, 2010)
- New SBA Rules on 8(a) Program, size, joint ventures and mentor/protégé programs (February 2011)

NEW POLICY DEVELOPMENTS

- GAO report on 8(a) program -14 ineligible firms received \$325 million in 8(a) contracts (March 2010)
- Presidential Memorandum on Federal Small Business Contracting (April 2010)
 - [Small Business Inter-Agency Task Force](#)
- GAO report on SDVOSB program-Fraud prevention controls needed (May 2010)
- GAO report on HUBZone Program-HUBZone program remains vulnerable to fraud (June 2010)
- SBA Administrator Karen Mills testifies before Congress re SBA enforcement initiatives (July 2010)

NEW POLICY AND CASE LAW DEVELOPMENTS

- *Morris Griffin* case (August 2010)
- GTSI Suspension (October 1, 2010)
- Congress begins “strategic review” of SBA operations (February 2011)
- Legislation introduced affecting small business programs
- Construction Engineering Services, LLC. SBA No. VET-213
- *Technatomy Corporation* case (June 14, 2011)



SDVOSB JOINT VENTURE VICTORY

- SBA rulings prevented SDVOSBs from forming joint ventures constituted as “separate legal entities” because of requirement that such entity be directly owned by SDV
- SBA regulations distinguished between JVs constituted as LLCs versus those that were created by virtue of a written agreement; legally, however, both are “separate legal entities”
- In an appeal filed by PilieroMazza at SBA’s Office of Hearings and Appeals, OHA overturned its prior precedent on this issue even though SBA opposed our appeal
- Case is *Construction Engineering Services LLC*, SBA No. VET-213

SMALL BUSINESS JOBS ACT - SIZE STANDARDS

- Small Business Jobs Act of 2010 requires SBA to do a rolling review of 1/3 of all size standards every 18 months
- Size standards review for Sectors 44-45 (Retail Trade), 72 (Accommodation and Food Services) and 81 (Other Services) published Oct. 6, 2010
- Proposed changes to Sectors 54 (Professional, Scientific and Technical Services) and 81 (Other Services) published on March 16, 2011; comments were due June 15, 2011
- Proposed rule changes to Sectors 48-49 (Transportation and Warehousing; comments due July 12, 2011
- Next in line: Sectors 22 (Utilities), 56 (Administrative Support and Waste Management Services) and 51 (Information)

SMALL BUSINESS JOBS ACT - MENTOR-PROTÉGÉ PROGRAMS

- Act allows for new Mentor-Protégé Programs for:
 - HUBZone Companies
 - SDVOSBs
 - WOSBs
- Act orders GAO to conduct a government-wide study of all mentor-protégé programs to determine effectiveness in increasing small business participation in federal contracting.
 - How is each federal agency carrying out its mentor-protégé program?
 - Are there systems in place to ensure the protégé truly gains from the program?
 - Degree to which protégé is able to compete for federal contracts without the assistance of the mentor?

SMALL BUSINESS JOBS ACT - CERTIFICATION PROVISIONS

- **Deemed Certification” Provision**

Submission of a bid or proposal for, or registration on any Federal electronic database for the purpose of being eligible for, any Federal contract or subcontract will be considered to be an “affirmative, willful, and intentional certification” as to the status and size of the offeror

SMALL BUSINESS JOBS ACT - CERTIFICATION PROVISIONS

- **“Presumed Loss” Rule**

For each contract or subcontract, there “shall be a presumption of loss to the United States based on the total amount expended” on the contract or subcontract where it is established that a business concern other than a small business concern willfully sought and received a contract award by misrepresentation

SMALL BUSINESS JOBS ACT - CERTIFICATION PROVISIONS

- **Exceptions**

SBA to publish regulations to provide “adequate protections” from liability in cases of “unintentional errors, technical malfunctions, and other similar situations.”

LARGE BUSINESS AS PRIME

- Subcontracting Plan

- FAR 52.219-19, Small Business Subcontracting Plan
- Must make “good faith” efforts at compliance
- Failure to make good faith efforts could result in liquidated damages
- Failure to make good faith efforts could constitute a material breach and lead to contract termination
- May rely on subcontractor certifications for certain types of small businesses

NEW DEVELOPMENTS: LARGE BUSINESS AS PRIME

- Small Business Jobs Act of 2010
 - Policy must be established by OFPP/FAR Council re subcontracting compliance
 - Large prime must represent that it will make a “good faith” effort to subcontract to small businesses identified in subcontracting plan and/or included in proposal; large prime must provide explanation to CO for failure to do so
 - Notification and possible adverse evaluation and reporting of unjustified non/slow payment of subs

TRANSPARENCY

- Federal Awardee Performance and Integrity Information System (“FAPIIS”)
See 75 Fed. Reg. 14059 (Mar. 23, 2010)
 - AKA The “Bad Boy List”
- Changes to Organizational Conflict of Interest Policies
- SBA Top Priority – **Eliminate Fraud, Waste and Abuse**

NEW DEVELOPMENTS: EXECUTIVE COMPENSATION

- Reporting of Executive Compensation
 - FAR 52.204-10, Reporting of Executive Compensation and First Tier Contract Awards
 - As of March 1, FAR clause will be included in contracts in excess of \$25,000
 - Must report compensation of top 5 executives, if subcontractor received 80% of its revenues and more than \$25 million from federal sources in the preceding fiscal year, and information not otherwise public
 - Report subcontractor information in www.fsrs.gov

LARGE BUSINESS AS SUB

- FAR 52.219-14, Limitations on Subcontracting
 - a.k.a “performance of work” requirement
 - Small business prime must perform a certain percentage of the contract work with its own employees
 - Percentage amount varies according to type of contract
 - Small Business:
 - services = 50% cost of contract incurred for personnel;
 - manufacturing = 50% cost of manufacture, excluding cost of materials;
 - construction = 15% cost of the contract incurred for personnel, excluding cost of materials

LARGE BUSINESS AS SUB

- FAR 52.219-14, Limitations on Subcontracting (cont.)
 - Nonmanufacturer rule – small business primes must provide products manufactured by a small business in the US
 - Different performance of work requirements for HUBZone contracts
 - Small business suppliers must either take ownership or possession of the supplies.

JOINT VENTURES

- **Affiliation Exceptions (13 C.F.R. 121.103(h))**
 - Small Business Joint Venture: two or more businesses may joint venture for a small business set-aside provided (1) the procurement reflects “bundled requirement” or (2) each is “small” under the NAICS code applicable to the procurement *and*:
 - If revenue-based size standard, contract’s value is greater than ½ of size standard, *or*
 - If employee-based size standard, contract’s value exceeds \$10 million
 - 8(a) Joint Venture: **approved** 8(a) joint venture may compete for 8(a) and small business set-asides if: (1) 8(a) partner is ½ of applicable size standard, (2) all other partners “small” and (3) procurement meets the thresholds above



JOINT VENTURES FOR SMALL BUSINESS

<u>Rule Citation</u>	<u>Current Rule</u>	<u>Final Rule</u>
13 C.F.R. § 121.103(h)	<ul style="list-style-type: none">▪ The so-called “3 in 2” rule, which states that two firms are limited to pursuing three contract opportunities under one JV. To pursue an opportunity means to submit an offer.	<ul style="list-style-type: none">▪ The “3 in 2” limitation changed from three <i>offers</i> to three <i>contract awards</i> under one JV within two years.
13 C.F.R. § 121.103(h)(3)(iii)	<ul style="list-style-type: none">▪ As OHA confirmed in <u>Size Appeal of SES-TECH Global Solutions</u>, SBA No. SIZ-4951 (2008), the 8(a) JV rules currently apply only to MP JVs that pursue 8(a) contracts.	<ul style="list-style-type: none">▪ Amended §121.103(h)(3)(iii) to make clear that any JV seeking to use 8(a) MP status as a basis for an exception to affiliation for SB set-asides must follow the 8(a) JV rules set forth in §124.513(c), (d).



SBA NEW RULES: MENTOR-PROTÉGÉ JOINT VENTURES

<u>Rule Citation</u>	<u>Current Rule</u>	<u>Final Rule</u>
13 C.F.R. § 121.103(h)(3)(iii)	<ul style="list-style-type: none">Two firms in an approved 8(a) MP arrangement may JV as a small business for any <i>federal procurement</i>, provided certain criteria are met.	<ul style="list-style-type: none">MP JVs may be considered small for both federal procurements <i>and subcontracts</i>.



SBA NEW RULES: 8(a) JOINT VENTURES

<u>Rule Citation</u>	<u>Current Rule</u>	<u>Final Rule</u>
13 C.F.R. § 124.513(d)	<ul style="list-style-type: none">For 8(a) JVs, the performance of work rule is satisfied through the JV. This means the JV partners may also serve as subcontractors for a significant portion of the JV prime contract.	<ul style="list-style-type: none">For <i>populated</i> 8(a) JVs, the non-8(a) partner (or any of its affiliates) cannot be a subcontractor to the JV or to any subcontractor of the JV.
13 C.F.R. § 124.513(d)	<ul style="list-style-type: none">The 8(a) JV partner must perform a “significant portion” of the work done by the JV. There is no definition of “significant portion” in the current regulation.	<ul style="list-style-type: none">For <i>unpopulated</i> 8(a) JVs, the 8(a) JV partner must perform at least 40% of the work done by the JV partners (including non-8(a) partner subcontracts at any tier). For <i>populated</i> 8(a) JVs, the JV must demonstrate how the 8(a) partner will benefit from the JV relationship.



SBA NEW RULES: 8(a) JOINT VENTURES

<u>Rule Citation</u>	<u>Current Rule</u>	<u>Final Rule</u>
13 C.F.R. § 124.513(c)(3)	<ul style="list-style-type: none">▪ The 8(a) JV partner must receive 51% of the profits from the JV.	<ul style="list-style-type: none">▪ Recognizing the inequity this requirement causes when the non-8(a) firm performs more of the work in the JV, SBA amended this rule to provide that the 8(a) JV partner must receive profits from the JV commensurate with the work the 8(a) partner actually performs or, if JV separate legal entity, commensurate with its interest in JV.

MENTOR-PROTÉGÉ AGREEMENTS

■ 8(a) Mentor-Protégé Program

- Broad exclusion from affiliation
- Ostensible subcontractor rule generally not an issue with MP Prime/Sub relationships
- 8(a) protégé may joint venture with their mentors, regardless of the size of the mentor
- Mentor may own up to 40% of protégé

MENTOR-PROTÉGÉ AGREEMENTS

- **DoD Mentor-Protégé Program**

- Exclusion from affiliation
- Reimbursement for developmental assistance costs up to \$1 million (depending on funding)
- Subcontracting credit for unreimbursed assistance costs



SBA NEW RULES: MENTOR-PROTÉGÉ PROGRAM

<u>Rule Citation</u>	<u>Current Rule</u>	<u>Final Rule</u>
13 C.F.R. § 121.103(b)(6)	<ul style="list-style-type: none">▪ This rule provides an exemption from affiliation when one firm (not small) provides assistance to another (small) firm under a federal MP program.	<ul style="list-style-type: none">▪ SBA has modified rules to make clear that the MP affiliation exception only applies to firms in a MP program specifically authorized by statute (i.e., the SBA or DOD MP programs) or where SBA has authorized an exception for another federal agency's MP program.



SBA NEW RULES: MENTOR-PROTÉGÉ PROGRAM

<u>Rule Citation</u>	<u>Current Rule</u>	<u>Final Rule</u>
13 C.F.R. § 124.520(b)	<ul style="list-style-type: none">Nonprofits cannot serve as mentors because they are not considered to be a “concern” as that term is used in this regulations and defined in 13 C.F.R. § 121.105.	<ul style="list-style-type: none">SBA changed the regulation to permit nonprofits to serve as mentors.
13 C.F.R. § 124.520(b)(2)	<ul style="list-style-type: none">Generally, mentors may have only one protégé at a time unless SBA approves more.	<ul style="list-style-type: none">SBA imposed an absolute limit of three protégés per mentor at a time



SBA NEW RULES: MENTOR-PROTÉGÉ PROGRAM

<u>Rule Citation</u>	<u>Current Rule</u>	<u>Proposed Changes</u>
13 C.F.R. § 124.520(c)(2)	<ul style="list-style-type: none">Only firms in good standing in the 8(a) Program are eligible to be a protégé.	<ul style="list-style-type: none">SBA clarified that the benefits of the MP program end once the protégé exits the 8(a) Program. A JV between a mentor and protégé is expected to complete performance of any contract awarded to the JV while the protégé was in the 8(a) Program.
13 C.F.R. § 124.520(c)(3)	<ul style="list-style-type: none">Protégés may have only one mentor.	<ul style="list-style-type: none">Recognizing that in some cases a second MP relationship is warranted, SBA now allows a second mentor in limited circumstances when the second mentor relationship pertains to an unrelated, secondary NAICS code and the first mentor does not have the specific expertise that the second mentor can provide.



SBA NEW RULES: MENTOR-PROTÉGÉ PROGRAMS

<u>Rule Citation</u>	<u>Current Rule</u>	<u>Final Rule</u>
13 C.F.R. § 124.520(c)(5)	<ul style="list-style-type: none">▪ Currently, an 8(a) firm is eligible to be a protégé if it is in the developmental stage of the 8(a) Program, has never received an 8(a) contract, or is half their applicable size standard.	<ul style="list-style-type: none">▪ An 8(a) firm in the last six months of the program is not eligible to be a protégé. An 8(a) firm cannot be a mentor and a protégé at the same time.

SBA NEW RULES: MENTOR-PROTÉGÉ PROGRAMS

- **Consequences of Not Providing Assistance Set Forth in the Mentor/Protégé Agreement**
13 C.F.R. § 124.520(h)

Final Rule:

- Allows SBA to recommend that agency issue a stop work order on each contract awarded to a mentor-protégé joint venture if the mentor is not providing the assistance set forth in the mentor-protégé agreement. Allows SBA to terminate MP agreement.
- Former mentor cannot serve as mentor again for two years from date of termination of MP agreement.
- SBA may recommend substituting protégé for JV under JV contracts.

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QUESTIONS?

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