

SAM, CVE, SBA, Update and Joint Venture Agreements

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November 7, 2018

Summary

- New Rules for SAM, SBA, and CVE
- Mentor Protégé Program
- Joint Venture Agreements

SAM Update

- Authorized Entity Representative
- Login.gov
- New Joint Venture Registration Requirement.

VOSB and SDVOSB Update

- As of 10/1/18, the SBA regulations control admission into the program, there is only one set of rules.
- The new rules are at this link:
<https://www.federalregister.gov/documents/2018/09/24/2018-20639/va-veteran-owned-small-business-vosb-verification-guidelines>

The Differences

- SBA is self certifying; VA requires verification
- Under VA, SDVOSB And VOSB have priority over other socioeconomic classes; no priority under SBA program.

Key Elements of the New Rules

- The New Rule
- Most differences between the SBA and VA program have been eliminated.
- SBA rules will control qualification with the exception of determining veteran status

Key Changes of the New Rules (Continued)

- VA and SBA will treat joint ventures the same way.
- Appeals will go to the SBA Office of Hearing and Appeals, not the VA.

Key Changes in the New Rules (Continued)

- The “surviving spouse rule will remain in effect.
- Veteran holding the company’s highest officer position must be most highly compensated.

Joint Ventures

Definition:

Two or more companies form a partnership or joint venture to act as potential prime contractor (FAR 9.601)

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A Brief Note About Joint Ventures v. Subcontracting

- You can always establish a joint venture with another business
- You can always subcontract with another business.

But

- You will always run into the affiliation issue when you do so.

General Joint Venture Issues

The 3 awards over two years rule

- May not be awarded more than 3 contracts over a 2 year period. If this rule is violated, JV members are affiliates for all purposes.
- Once a joint venture receives one contract, the rule applies as of the date of initial offer including price
- May be awarded more than three contracts where the joint venture had received two or fewer contracts as of the date it submitted one or more additional offers which result in one or more additional contract awards.
- May create additional joint ventures, and each new joint venture entity may be awarded up to three contracts. Longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them

General Joint Venture

Issues (Cont)

- JV agreement must be in writing
- JV may not be populated with contract performing employees
- Administrative employees are OK
- Must be separately identified in SAM as a JV at the time the bid is submitted

The JV Agreement

- Small business must be manager of JV.
- Project manager must be employee of small business. Cannot be shifted from “large” partner to small.
- Small business must own at least 51% of JV.

The JV Agreement (cont)

- The Managing Member “must receive profits from the joint venture commensurate with the work performed” by the managing member
- Special bank account in the name of the JV. All expenses must be paid from this account, withdrawals require signature of all parties.

The JV Agreement (cont)

- All major equipment, facilities and other resources to be furnished by party must be itemized.
- The responsibilities of each party with regard to negotiation, source of labor and contract performance must be specified.

The JV Agreement (cont)

- All parties to the JV must be obligated to complete the work if one member withdraws.
- Accounting and administrative records must be kept in the office of the small business managing venture. This also applies to original records after contract completion.

The JV Agreement (cont)

- Quarterly financial statements must be submitted to the SBA within 45 days of the end of each quarter.
- Project end profit and lost statement, including final distribution of profits, must be provided to SBA within 90 days of completion.

More Details

- Small Business Joint Ventures must be registered in SAM
- ASMPP approval letter must be included with JV package
- In order to receive the exclusion from affiliation, the joint venture must meet the requirements outlined in 13 CFR 125.8(b)(2), (c), and (d). (contents of JV agreement.

Small Business Issues

- Size Standards
- Affiliation
- Ostensible Subcontractor
- Minimum Percentage of Work Requirements

Size Standards

- Annual receipts: total receipts of the concern over its most recently completed three fiscal years divided by three (13 C.F.R. 121.104); or
- Number of employees

Affiliation

In determining affiliation, the SBA will consider:

- Control or power to control
- Ownership, management, previous relationships
- Affirmative or negative control

Affiliation: The Starting Point

- SBA may presume an identity of interest based upon economic dependence if the concern in question derived 70% or more of its receipts from another concern over the previous three fiscal years.
- This presumption may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern, such as where the concern has been in business for a short amount of time and has only been able to secure a limited number of contracts.

Types of Affiliation

- Stock Ownership
- Stock Options
- Common Management
- Identify of Interest
- Newly Organized Concern
- Joint Ventures
 - Mentor Protégé Agreements
 - Ostensible Subcontractor Problem.
- Franchise and License Agreements

Affiliation: Its Many Meanings

A small business and a large business working under a SBA Mentor Protégé program are not affiliates simply because the large business provides support under a Mentor Protégé agreement.

Affiliation (cont)

Members of a Joint Venture or Presumed to be affiliated except

- 8(a) joint venture agreements approved by the SBA (JV preapproval required)
- Joint venture agreements under the All Small Mentor Protégé Programs. (JV approval not required)

Percentage of Work Requirements

For set-aside service contracts, small business concern must perform at least 50 percent of the “cost of the contract incurred for personnel with its own employees

In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the cost of materials).

Ostensible Subcontractor

The Problem

Definition

A contractor and its ostensible subcontractor are treated as joint venturers and therefore, affiliates for size determination purposes. An ostensible subcontractor is a subcontractor that is not a similarly situated entity, as that term is defined in §125.1 of this chapter, and **performs primary and vital requirements of a contract**, or of an order, or is a subcontractor upon which the prime contractor is unusually reliant.

Ostensible Subcontractor Rule_(cont)

While the SBA has traditionally looked to the seven (7) factor test to determine whether a subcontractor is “ostensible,” the SBA has recently stated “all aspects” of the contractor/subcontractor relationship should be examined.

The seven (7) factors

- Who will manage the contract;
- which party possesses the requisite background and expertise to carry out the contract;
- Which party “chased the contract”;
- What degree of collaboration was there on the bid or proposal;
- Whether there are discrete tasks to be performed by each, or a commingling of personnel and material;
- The relative amount of work to be performed by each; and
- Which party performs the more complex and costly contract functions.

Ostensible Subcontractor The Uncertainty

- Contractors are not affiliates if they are operating under an approved MP Agreement
- How does the Ostensible Subcontractor Rule impact that status?

Ostensible Subcontractor The Solution?

A Prime/Small relationship defined by a MP agreement does not violate the Ostensible Subcontractor Rule solely because the prime is providing the support in the agreement. However, if a particular proposal indicates the large subcontractor support for that particular proposal is so extensive that the subcontractor will be providing the “primary or vital” elements of the work or the small prime is “unusually reliant” on the large prime, the rule is violated.

The Big Difference Between the 8(a) and All Small Programs

- Difference between the 8(a) MP Program and the “All Small Program”
- In the 8(a) program, joint venture agreements must be approved by the SBA before the joint venture can submit a bid or proposal. This requirement does not apply to the All Small Program.

The Big Difference

Part II

Under 8(a), MP agreements are approved by field offices, under the All Small Program, there will be a single office.

Why Does it Matter?

Less bureaucracy = less cost and delay

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Self Protection

- The JV or teaming agreement must mirror the approved MP agreement.
- The small must perform 40% of the JV's work. If there is no JV, the small must perform the percentage of work otherwise required.
- No populated JV's.

Conclusion

- Thank you for attending.
- If you have questions, please contact me at ejk@uslegalteam.com, You may also call us at 321 255 2332

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