

Summary of Key SBA 8(a) Rule Changes

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Effective March 14, 2011

Changes Affecting All 8(a) Participants

- **All Joint Ventures:** 13 CFR 121.103(h)
 - a) Joint ventures must be in writing and may, but need not, be in the form of a separate legal entity. JVs may (but need not) be populated (i.e., have its own separate employees).
 - b) JVs may not be awarded more than three contracts over a two year period without a finding of affiliation. This begins two years starting from the date of the award of the first contract, but compliance (after the first contract award) is determined as of the date of the initial offer.
 - c) The same two entities may form additional joint ventures, and each may be awarded three contracts over two years.

- **8(a) Joint Ventures:** 13 CFR 124.513
 - a) Unpopulated: The amount of work by all members to the JV will be aggregated, and the 8(a) partner to the joint venture must perform at least 40% of the required work; this means 40% of the amount required by the limitations on subcontracting clause. For a service contract, this calculates to 20% of the contract labor (because the JV must perform at least 50% of the work overall.)
 - i) The 40% threshold replaces the prior requirement that the 8(a) firm perform a “significant portion” of the work – a standard which was subject to varying interpretations.
 - ii) The 40% must be more than ministerial or administrative
 - iii) Non-8(a) member of the JV may not also act as a subcontractor
 - iv) 8(a) firm must have project manager or senior manager of JV
 - b) Populated: 8(a) firm must demonstrate to SBA how it will benefit or other develop its business as a result of the JV relationship
 - i) How to make this showing is unclear
 - ii) Limitation regarding who can act as a subcontractor does not apply, because by definition both members of the JV will be subs.
 - c) Performance of Work Proof now required at end of contract and as part of annual review process.

- **Mentor/Protégé Program:** 13 CFR 124.520
 - a) Assistance to be provided must be tied to protégé’s SBA approved business plan.
 - i) Meaning *not* whatever the mentor conveniently happens to remember to provide when they get around to it.

- b) Exclusion from affiliation ends when protégé exits the 8(a) program.
- c) The new regulations permit an M/P joint venture to be small for federal subcontracts. This is a big win for firms with a DOE presence, as it makes those firms more desirable to the larger DOE primes.
- d) M/P agreements must be approved before the two firms can submit a JV offer as a small business.
 - i) Plan ahead; has the potential to make M/P relationships less contract driven.
- e) The M/P agreements must comply with the 8(a) JV requirements to receive exclusion from affiliation on non-8(a) contracts.
- f) There are now a variety of new regulatory consequences for a mentor that fails to provide the agreed-upon assistance to the protégé, including suspension and debarment.

- **Primary NAICS Code:** 13 CFR 124.102 and 124.302

- a) SBA may graduate a Participant where the firm exceeds the size standard corresponding to its primary NAICS code, as adjusted, for three successive program years.
 - 1. There is no graduation if the firm can demonstrate that, through its growth and development, its primary NAICS code is changing to a secondary NAICS code in its adjusted business plan.

- **Applicant and Participant Representatives** (also known as “One Percenters” or “Marketers”): 13 CFR 124.4

- a) Compensation received by any packager, agent or representative of any 8(a) applicant or Participant for assisting in obtaining 8(a) certification, 8(a) contracts or other assistance must be “reasonable” in light of services provided.
- b) The fee cannot be a percentage of gross contract value.
- c) They may be suspended from assisting 8(a) applicants or Participants for cause.
- d) SBA stated at RES 2011 Tribal Consultation that:
 - i) Not intended to disrupt existing contracts *unless* those contracts are not limited to a specific contract opportunity.

- **Excessive Withdrawals:** 13 CFR 124.112

- a) Prohibited “excessive” withdrawals exclude employee compensation, unless SBA believes the firm is attempting to circumvent the regulations through the payment of salaries. It is a “totality of the circumstances” evaluation.
- b) Excessive withdrawal limits do not apply to tribes, ANCs, NHOs, or CDCs where withdrawal is made for the benefit of the tribe/ANC/NHO/CDC or the Native or shareholder community.
- c) Applies to 8(a) participants, not parent companies.

- **Audit Requirements: 13 CFR 124.602**

- a) Audited financials required if a firm exceeds \$10M in gross annual receipts
- b) Native owned firms may submit consolidated audited financials for a parent company, with schedules for the 8(a) subsidiaries.

Changes Affecting Tribal Entities

- **Eligibility for 8(a) Contracts in Secondary NAICS Codes: 13 CFR 124.109**

A firm owned by tribe, ANC, NHO or CDC may not receive a sole source 8(a) contract that is a follow-on contract to an 8(a) contract immediately performed previously by another Participant (or former Participant) owned by the same tribe/ANC/NHO/CDC.

- **Potential for Success: 13 CFR 124.109 and 124.110**

Native firms may receive an exemption from the normal requirement that a firm be in business for two years prior to 8(a) program admission, if the tribe, ANC, NHO, or community-development corporation (CDC) makes a firm written commitment to support the operations of the applicant concern, and the entity has the financial ability to do so.

- **Benefits Reporting: 13 CFR 124.604**

This change requires firms owned by tribes, ANCs, NHOs, and CDCs to report on the benefits flowing back to shareholders and disadvantaged communities as a result of 8(a) participation. Benefits will be reported at the tribe/ANC/NHO/CDC parent corporation level, not the individual 8(a) firm level. However, implementation has been delayed for six months and discussion about format will continue through two more Tribal Consultations.