

The New 8(a) Regulations (and other interesting stuff)

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No Follow On Sole Source Contracts

- A firm owned by a tribe or ANC may not receive a sole source 8(a) contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant or former Participant owned by the same tribe.
- But be aware: SBA Compliance Guide

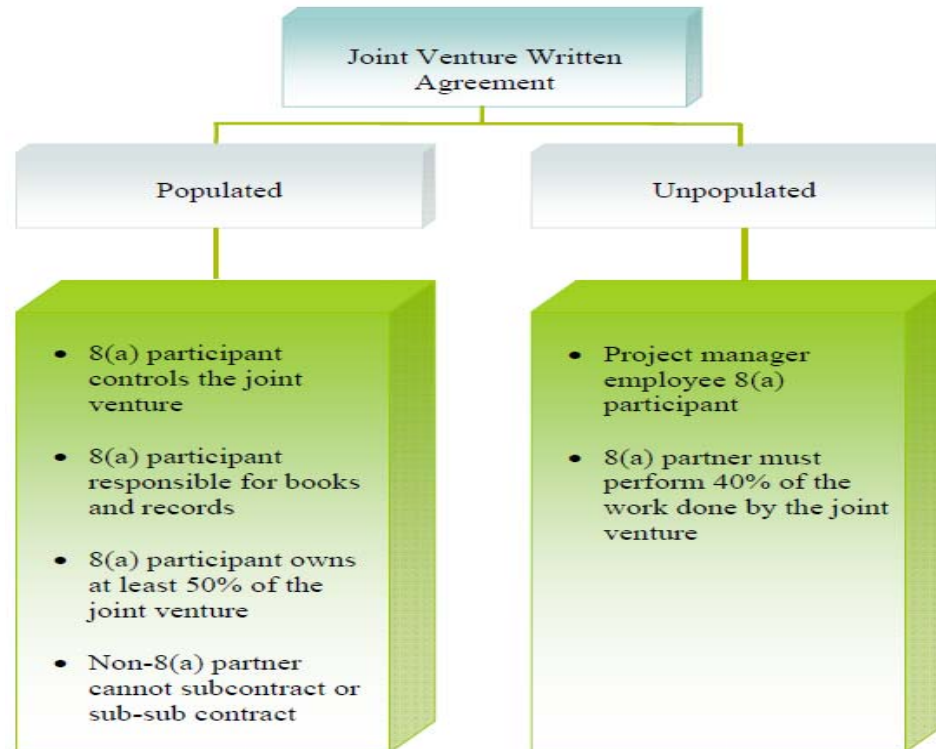
3 Years and Out

- Out of the program if other than small in its primary NAICS code for three years
- Unless the firm can demonstrate that it has made attempts and continues to move to one of the secondary NAICS code identified in its business plan and that it will change the primary NAICS code accordingly
- NAICS code tracking much more important
 - Firm may change its primary NAICS code by demonstrating that the majority of its revenues during a two year period have evolved from its former primary NAICS code to another NAICS code.
 - Means firms must track where their work is coming from, and SBA will as well – making overlap much easier to identify
- Coupled with new potential for success rule?

JV Compliance and Reporting

- Must have written agreement, whether separate legal structure or not
- Previous regulation: 3 offers in 2 years
- New regulation: 3 awards in 2 years
- Unpopulated or Populated: control demonstrated by written agreement
- More scrutiny on self performance (an imperfect science)

JV Compliance and Reporting



Mentor Protégé

- Mentors may have up to 3 protégés at one time.
- Demonstration of financial health by mentors has new avenues of proof.
- Protégé may add second mentor if not in the same NAICS Code and would not compete/conflict
- Cannot be a mentor and a protégé at the same time
- Mentor/Protégé agreement must be approved by SBA before the two firms can submit a joint venture offer to receive the exception to affiliation.

Mentor Protégé

- SBA and Department of Defense Mentor Protégé agreements recognized: rest must be approved by SBA
- SBA does not approve mentor/protégé agreements for non-8(a) work, but if a non-8(a) award is protested based on size if joint venture and mentor/protégé requirements are met

Benefits Reporting

- Lots of anxiety in ANC community regarding how this will occur
- SBA focused on quantifiable measures:
 - Dividends
 - Funding cultural programs
 - Employment, internships
 - Scholarships
 - Subsistence activities and other services.
- Where does the information go?
- How does it continue to drive comparisons?

Bona Fide Office

- 8(a) construction contracts requirement comes from 15 USC 6371(a)(11).
- Participant submits its request to recognize its bona fide office in a different location than its servicing district office.
- District office then forwards to the new geographic office; new geographic location district office contacts the Participant if it needs further information.
- The effective date of a bona fide place of business is the date that the evidence (paperwork) shows that the business in fact regularly maintained its business at the new geographic location.
- EXCEPT: Commentary does not match the reg itself

Marketing Agents / Consultants

- New fee limits on “packagers,” agents, consultants
- Compensation “reasonable in light of the services performed.”
 - Not calculated based on gross contract value, or as a percentage of profit
- SBA can intervene if necessary; could refer for suspension and debarment
- SBA feedback at Tribal Consultation:
 - Existing arrangements okay UNLESS they cover fees beyond a specific contract.
- Importance of good definitions; impact of litigation

Section 811:

The New J&A Requirement

- Section 811 of 2010 NDAA; applies to sole source contracts valued at \$20M or higher
- Five elements of J&A
 - (1) description of the needs of the agency concerned for the matters covered by the contract;
 - (2) specification of statutory provision providing the exception to full and open competition
 - (3) determination that use of sole source contract is in the best interest of the agency;
 - (4) determination that the anticipated cost of contract is fair and reasonable;
 - (5) such other matters as the head of the agency shall specify

Section 811: The most interesting questions

- Does small business community recognize the impact, in light of new competitive thresholds?
- What is in the “best interest of an agency?”
- Publication = Protests
 - See FAR 6.302 and FAR 5.203