

Joint Ventures & Teaming Agreements

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U.S. Small Business Administration

What is a small business?

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- Organized for profit
- Place of Business in the U.S.
 - operates primarily in the U.S.
 - makes a significant contribution to the U.S. economy (taxes, use of American products/labor)
- Does not exceed the small business size standard for the procurement
 - Each North American Industrial Classification System (NAICS) code has a small business size standard
 - WWW.SBA.GOV/SIZE (“TABLE OF SIZE STANDARDS”)
 - wholesale and retail NAICS are not used in government procurements
 - Revenue or employees
 - 13 CFR 121.105

Size must include affiliates

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- What is an affiliate?
- When one controls or has the power to control another
 - ▣ Common ownership
 - ▣ Common control
 - ▣ Common management
 - ▣ Identity of Interest (family members, common investments, dependant through contractual relationships)
 - ▣ A Newly organized concern
 - ▣ Joint Ventures



■ 13 CFR 121.103

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Two Types of Affiliation

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- General Affiliation
 - On-going basis
 - Common ownership, common control, economic dependence, etc.
 - Applies to the company in all business transactions

- For a specific procurement
 - Joint venture
 - Applies only to the contract at hand

Joint Ventures

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- A joint venture is:
 - An association of individuals and/or concerns engaging in and carrying out specific or limited-purpose business ventures for joint profit
 - To combine efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally.
 - No more than 3 contracts over a 2-year period starting from date of submission of first offer (3 in 2 rule). 13 CFR 121.103(h)

Joint Ventures

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- The same two (or more) entities may create additional joint ventures, and each is subject to 3-in-2 rule:
 - ABC-XYZ JV
 - ABC-XYZ 1
 - ABC-XYZ 2
- However, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between them.

Joint Ventures must be in writing

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- A joint venture must:
 - be in writing
 - do business under its own name

- It may (but need not):
 - be in the form of a separate legal entity, and if it is a separate legal entity it may (but need not) be populated (*i.e.*, have its own separate employees).
 - NDAA 2013 proposed rule: separate legal entity may not be populated except admin

Joint Ventures vs Teaming Agreements

A Teaming Agreement can be either a joint venture or a prime/sub relationship

Joint Venture vs. Prime/Sub Relationship

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- SBA affiliation regulations purposely do not define “teams” or “teaming agreements”
- **Joint Venture**
- **Prime Subcontractor Relationship**

Teaming Arrangement: FAR 9.601

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“Contractor team arrangement,” as used in this subpart, means an arrangement in which—

- ▣ Two or more companies form a partnership or **joint venture** to act as a potential prime contractor;
- ▣ A potential **prime contractor** agrees with one or more other companies to have them act as its **subcontractors** under a specified Government contract or acquisition program.

What are the Benefits?

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- General benefit for all concerns both large and small:
 - The joint or team is able to compete for larger more technically complex contracts by combining the capabilities and past performance of various team members.



□ FAR 9.601

Joint Venture Size Exemptions

General Rule

A joint venture is a small business concern when the combined revenue/employees of all joint venture partners do not exceed the small business size standard.

JV Size Exemption for “Large” Procurements

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- If:
 - The procurement is bundled; or
 - It is a “large” procurement
 - For a procurement having a receipts based size standard, the dollar value of the procurement exceeds $\frac{1}{2}$ the size standard; or
 - For a procurements having an employee based size standard, the dollar value of the procurement exceeds \$10 million.
- Then, the joint venture is small if each joint venture partner is small.

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Ostensible Subcontracting

**More of a joint venture than a
prime-subcontractor relationship**

What is an Ostensible Subcontractor?

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The acid test:

- A subcontractor is an ostensible subcontractor if:
 - The subcontractor performs the primary and vital requirements, or
 - The prime contractor is unusually or unduly reliant upon the subcontractor.
- A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. 13 CFR 121.103(h)(4)

What will be used to determine if Teaming Agreement is a JV?

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- Language Used in the Teaming Agreement
- Proposal wording
- Other circumstances:
 - Reliance on Bonding
 - Who is in control/managing contract
 - Division of work (clear delineation)
 - Role in pursuit of contract
 - Whether subcontractor was the incumbent
- “7 factor test” no longer used.

What is an Ostensible Subcontractor?

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- *Morris-Griffin v. C&L Service Corporation, 2010 WL 3221975 (E.D. Va)*
 - Summary:
http://www.roseconsultingllc.org/Summary_of_Morris-Griffin_v.pdf

- *Large HUD loan processing company teamed with janitorial 8(a) company to win 8(a) set-aside contract to process loans for HUD – found to have fraudulently circumvented the SBA rules by using a nominal 8(a) contractor.*

What is an Ostensible Subcontractor?

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- *Size Appeal of Professional Service Corporation, SBA No. SIZ-5548 (2014)*
 - <https://www.sba.gov/oha/decisions>

- *Every manager position in a small businesses proposal other than the President of the small business is filled directly by subcontractor personnel or with individuals hired from the subcontractor (including the Project Manager), specifically for the positions they previously held as the incumbent contractor. The incumbent subcontract was ineligible as a prime contractor for the procurement.*

Points for Prime/Sub Relationships

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- Agencies may consider an offeror's subcontractor's capabilities and experience under relevant evaluation factors where the RFP does not prohibit the consideration of a subcontractor's experience in the evaluation of proposals (*Roca Management Education & Training, Inc., January 15, 2004, GAO, B-293067*).
- The prime contractor is solely responsible for meeting all contract requirements, including the Limitations on Subcontracting percentage
- Must watch out for Ostensible Subcontractor relationship with its subcontractor(s)

Limitations on Subcontracting

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- Apply to cooperative efforts of the joint venture entity.
- Applies to full or partial small business set-aside contract, an 8(a) contract, a WOSB or EDWOSB
 - Supplies: 50% cost of manufacturing excl mat'l
 - Services: 50% with its own employees
 - General Construction: 15% with its own employees
 - Specialty Construction 25% with its own employees

13 CFR 125.6

Provisions for 8(a) contractors

8(a) Joint Ventures

8(a) Mentor Protégé size exemption

8(a) competitive contracts size exemption

8(a) Points for Joint Ventures

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- For 8a contracts, the formal joint venture must be approved by SBA.
- For other contracts (i.e., SBSA, HUBZone set-aside), SBA does not need to approve the joint venture prior to award, but if the size status of the joint venture is protested, the provisions of §§124.513(c) and (d) will apply.
 - (c) – joint venture content requirements
 - (d) – performance of work requirements

8a Performance of Work Reqmnts.

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- In an unpopulated JV, the 8a partners must perform at least 40% of the work performed by the JV
- 40% cannot just be administrative functions
 - 13 CFR 124.513(d)

8(a) Mentor Protégé Agreement

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- For joint venture between 8(a) protégé and SBA approved mentor:
 - The joint venture is considered small so long as the 8(a) protégé is small for the procurement.
 - 13 CFR 124.513(b)(3)
 - The joint venture may bid as a small business on any federal prime or subcontract.
 - 13 CFR 121.103(h)(3)(iii)

8(a) Mentor Protégé

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- A mentor and its protégé must:
 - Bid as a joint venture in order to qualify for the exclusion to affiliation (as opposed to a prime-sub relationship)
 - Have a joint venture with all the elements of 13 CFR 124.513(c)
 - Meet the performance of work requirements in 13 CFR 124.513(d)
- If an 8a procurement, JV agreement must be approved by SBA

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Provisions for HUBZones

HUBZone Joint Ventures

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- A HUBZone may only joint venture ONLY with another HUBZone concern (even applies to mentors).
- The JV itself need not be certified as a HUBZone concern.
- If it is a “large” procurement, it can qualify as small as long as each HUBZone partner is small for the NAICS code assigned to the procurement.

HUBZone Limitations on Subcontracting

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- The aggregate of the HUBZone partners or HUBZone subcontractors must perform the applicable percentage of work required by 13 CFR 125.6.
- see 13 CFR 126.7 for application for general and specialty construction contractors.

13 CFR 126.7

Non-Manufacturing

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- Non-manufacturing waivers are not granted for HUBZone procurements.

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Provisions for SDV procurements

Provisions for SDVets

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- A SDV may enter into a JV Agreement with one or more other small businesses for purposes of a SDV contract
- For JV partners are affiliated unless it is a “large” procurement.
- The JV Agreement must comply with 125.15(b)(2) – the required contents of a SDV joint venture agreement
- The JV must perform the percentage of work requirements in 13 CFR 125.6

Limitations on Subcontracting

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- A SDV can fulfill the Limitations on Subcontracting requirements by using other SDV subcontractors

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Provisions for ED/WOSBs

EDWOSB or WOSB Joint Ventures

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- ❑ For JV partners are affiliated unless it is a “large” procurement.
- ❑ The EDWOSB or WOSB participant must be designated in SAM as an EDWOSB or WOSB.
- ❑ There must be a written joint venture provided to the Contracting Officer that contains the elements of 13 CFR 127.506.
- ❑ The JV must perform the applicable percentage of work in 13 CFR 125.6

New Regulations affecting JVs

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- PTACs and SBDCs may provide advisory size determinations
- New Mentor Protégé program for all small businesses (exemption from affiliation)
- Subcontracts to “Similarly situated entities” will not be found to be ostensible subcontractors