SBA Regulations National8 (a) Association June 2016

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Analysis and Application

Birch Horton Bittner & Cherot
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Introducing Your Presenters

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Your Presenters: John Klein

John Klein, Associate General Counsel for Procurement Law, U.S. Small Business Administration:

John is the principal legal advisor to senior Agency officials and their staffs with respect to the 8(a) Business Development program; the Agency's Government Contracting programs, including the small business set-aside, subcontracting and Certificate of Competency programs; the HUBZone program; the Small Business Innovation Research program; the Size Standards program; the Service Disabled Veteran-Owned Small Business program; and SBA's internal contracting procedures. Mr. Klein has been a lawyer in SBA's Office of General Counsel since 1983. Suspension and Debarment Official.

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Your Presenters: Jon DeVore

Jon is a Shareholder and since 2005 he has been with Birch Horton Bittner and Cherot law firm in Washington, D.C. Mr. DeVore's legal practice involves the SBA 8(a) program, small business development, business transactions, federal contract issues, GAO bid protest and cases before the SBA Office of Hearings and Appeals, and legislative and administrative advocacy with the State of Alaska and Federal governments. He is the former Legislative Director and Chief Counsel for U.S. Senator Lisa Murkowski. He was the District Counsel for the U.S. Small Business Administration (SBA) and Special Assistant U.S. Attorney in Alaska for thirteen years. Mr. DeVore was also corporate counsel for Bristol Bay Native Corporation and on the staff of U.S. Senator Ted Stevens and senior legislative assistant to U.S. Senator Frank Murkowski.

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Your Presenters: Christine Williams

Christine is an adjunct law professor on government contracting at Seattle University School of Law's Alaska Campus, as well as an adjunct master's instructor on government contracting and the 8(a) Program at Alaska Pacific University. She concentrates her practice on Government Contracting from counseling on qualifications and administration to disputes and companies in crisis. She represents clients in defending against federal investigations, including investigations/reports by the Office of the Inspector General, the Department of Justice, and the GAO. Christine also counsels companies on the procurement and administration of government contracts across all agencies. She has especially deep experience in the SBA and Section 8(a) Programs. Prior to Outlook Law, Christine was vice president and general council for a large Alaska Native Regional Corporation. She was also partner with Davis Wright Tremaine, Perkins Coie, and an attorney at Patton Boggs.

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Similarly Situated Entities

Under 13 CFR 125.1, a similarly situated entity is a subcontractor that has the same small business program status as the prime contractor. This means that. . . for an 8(a) requirement, a subcontractor that is an 8(a) certified Program Participant. In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also be small for the NAICS Code that the prime contractor assigned to the subcontract that the subcontractor will perform.

The NDAA deems any work done by a similarly situated entity (for instance an 8(a) contractor is similarly situated to another 8(a) contractor) is not considered to be "subcontracted" for the limits on subcontracting, but may be counted towards the mandatory performance level for the small business concern acting as the prime contractor.

What that breaks down to is that similarly situated subcontractors or the respective subcontracts ***at the first tier only*** are not subcontractors in the traditional sense of the word and can be counted towards the prime's mandatory performance levels on the contract.

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Similarly Situated Entities

Caution: the work performed ***must be performed*** by the employees of the prime contractor or employees of the first tier similarly situated entity to count towards the mandatory performance requirements. If a first tier similarly situated entity subcontracts out work, that work will count as subcontracts performed by a non-similarly situated entity.

The SBA is ***not requiring*** a written agreement with a predetermined similarly situated entity. That plan was not in place for SDVO or HUBZone programs. The SBA was concerned about the administrative burden placed on small business concerns and the programs having different burdens placed upon them.

The SBA is not requiring mandatory performance limits be reported to the contracting officer as this was not necessarily authorized by the statute and the SBA did not and does not require it for SDVO or HUBZone Programs.

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Similarly Situated Entities

The SBA clarified its proposed rule in that if a firm failed to meet its mandatory performance goals using similarly situated entities, the SBA ***could*** consider this as a basis for debarment, but the firm would have an opportunity to respond to any allegation with its own arguments and evidence.

Similarly Situated as it related to **Architects and Engineers Contracts**. Commenters to the rule were concerned that contracts awarded to an architecture firm having a size standard that is less than the size standard for engineering services would disqualify the engineering firm from performing. In response to these comments, ***the SBA is allowing prime contractors to assign NAICS Codes*** to the subcontracts. In this way, the SBA believes the approach will increase the ability of small business prime contractors to utilize similarly situated business entity subcontractors. In addition, this rule is consistent with the requirement that ***SBA rules require a prime contractor to assign the NAICS Code*** to a subcontract which describes the principal purpose of the subcontract. [13 CFR 125.3]

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Similarly Situated Entities

Fines and Penalties. The SBA notes that the $500,000 dollar fine is the minimum amount (or the amount spent in excess of the permitted levels if greater) mirrors Section 1652 of the NDAA. The SBA believes this will deter contractors from agreeing to comply with limitations on subcontracting without a practical plan for compliance with applicable subcontracting limitations as well as passing on work to firms that the prime has adequately ensured is similarly situated.

Exemption from Affiliation for Ostensible Subcontracting Rule. This exemption applies to the relationship between the prime and a similarly situated entity. In short, the prime and similarly situated first tier sub will not be found affiliated based on the ostensible subcontractor rule (think primary/vital and/or unduly reliant roles).

Who Counts the Revenue: The prime contractor will count the revenue (such as the revenue attributed to an 8(a) contract) when a similarly situated entity is used as a subcontractor and the prime contractor will not deduct the revenue amount subcontracted to that entity.

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Limitations on Subcontracting

Comes under one rule 13 CFR 125.6

125.6(a) explains how to apply the limitations on subcontracting requirements to small business concerns contracts using ***based on the percentage of the award amount*** (not the cost to perform the contract) and that certain small business concerns may not expend on subcontracts more than a specified amount, dictated by the type of contract performed UNLESS the (non) subcontract goes to a similarly situated entity (as further explained below).

In short, if a similarly situated entity performs as a ***first tier subcontractor*** that performance may count towards the mandatory performance required by the contract. The performance by a similarly situated entity in those circumstances is not considered a subcontract that counts towards the limitation on subcontracting and against the mandatory performance level.

Limitation for ***services and supplies*** is statutorily set at 50% of the ***award amount***.

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Limitations on Subcontracting

For contracts involving services and supplies, the SBA clarified that the contracting officer's selection of the applicable NAICS Code will determine which limitation applies.

The exclusion for the cost of materials from supply, construction, and specialty trade construction procurements is included in this final rule for purposes of limitation on subcontracting. (Think: stays the same)

For contracts that supply both services and supplies, the statutory authority authorizes that the limitations on subcontracts apply only to that portion of the requirement identified as the primary purpose of the contract.

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Affiliation: Identity of Interest and Economic Dependence: 13 CFR 121.103(f)

Base: Affiliation may arise when two or more persons or firms that have an identity of interest. Key words: identical or substantially identical business or economic interests (such as family members, common investments, economically dependent through contract or other relationship).

Change: Type of Relationship

The SBA narrowed the (familial) relationships for identity of interest to a seemingly more reasonable level. Now ***the presumption*** (presumption means its rebuttable) exists for firms that conduct business with each other that are owned and controlled by: (1) married couples; (2) parties to a civil union; (3) parents and children; and (4) siblings.

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Affiliation: Identity of Interest and Economic Dependence: 13 CFR 121.103(f)

Economic Dependence

If a firm derives 70% or more of its revenue from another firm over the previous fiscal year, SBA presumed and will presume that one firm is economically dependent on the other and likely find affiliation.

This presumption is also rebuttable and the SBA gave examples of some rebutting evidence and acknowledged that OHA used that 70% as guidance as well as allowing that 70% to be rebutted.

For instance, if a start-up secures just two contracts then one contract may skew the revenue for that fiscal year.

Additionally, where the receipts from an alleged affiliate are ***not strong enough*** to sustain a firm's business operations, and the firm is able to look to other financial support, such as some Alaska Native Corporations may have the ability to do, the fact that the firm received 70% of its receipts from an alleged affiliate may not be determinative.

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Affiliation: Identity of Interest and Economic Dependence: 13 CFR 121.103(f)

In essence, the final rule specifies that the presumption of affiliation based on economic dependence 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.

In addition, ***in regards to economic dependence***, the SBA has clarified that it will not find affiliation between sister subsidiaries owned by the same Indian Tribe, ANC, Native Hawaiian Organization, or Community Development Corporation. (Recall, the final regulations in other spots seem to be harder on those organizations-this is not a blanket affiliation exemption.) Clue on this one is control and whether one firm has the ability to control the other; in this case, control financially through the 70% rebuttable rule.

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Joint Ventures and Exclusion from Affiliation for Small Business Concerns

Current exclusion from affiliation based on mentor protégé relationship as long as the agreement is current and followed. That stands.

New exclusion: Broadens the exclusion and allows two or more small businesses to joint venture for any procurement without being affiliated with regard to the performance of ***that procurement*** requirement.

They both must be small under the NAICS Code for that procurement.

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Recertification After Merger/Acquisition and During Procurement Process

Still stands that you must recertify size after merger/acquisition.

Added clarification with a paragraph, that states the SBA requires new small certification for pending contracts when the merger or acquisition occurs after offer but prior to award.

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Who May Initiate a Size Protest as an Offeror

Clarification that an offeror has standing if it is in line or in consideration for award (inside the competitive range).

There is no standing for the offeror that has been found to be non-responsive, technically unacceptable, or outside of the competitive range.

Rule also added the SDVO and WOSB/EDWOSB to programs in which the SBA's Area Director, Officer of Government Contracting, can initiate a formal size determination, thereby matching other programs.

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NAICS Code Appeals and Timing

The SBA's current rule in which there is ten days for filing a NAICS Code appeal after solicitation or amendment to a contract still stands.

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Nonmanufacturer Rule

Unlike other programs, under the nonmanufacturer rule ("NMR"), there is no exemption for contracts between $3,500 and $150,000 because the SBA would like to encourage contracting officers to compete these types of contracts more often or, if not, apply for a waiver from the SBA for all or part of the contract.

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NONMANUFACTURER RULE

Commentators had questions on applicability of this regulation and the SBA provided the following guidance:

- The intent is for the NMR and the contract performance requirements (a/k/a the limitation on subcontracting to non-similarly situated entities) to operate in conjunction with each other.
- Thus, the SBA believes that appropriate way to calculate the true required percentage that is limited by subcontracting is to exclude the value of the waived items from the limitation (much like construction supplies on a construction contract). The SBA has added several examples in the regulations on this point.

Please note that the SBA is dealing with ***certain software*** specifically during the course of this regulation change as an ***item and not a service***. This falls in line with OHA cases and the SBA gives further guidance in its regulatory examples.

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Adverse Impact and Construction Requirements

The SBA clarified when a procurement for construction services is new and when the SBA must conduct an adverse impact analysis for new requirements.

Currently, the SBA regulations states that "[c]onstruction contracts, by their very nature (e.g., the building of a specific structure) are considered new requirements.

However, recurring Indefinite Delivery or Indefinite Quantity ("ID/IQ") procurements/orders under IDIQs and similar contract vehicles for construction services are not considered new.

The SBA has found that some agencies have misinterpreted this regulation and considered these recurring IDIQ construction services new. The SBA now clarifies it for those agencies and others that this is not new.

Whether a construction contract is new is made on a case by case basis and there is now a process in place ***that allows the SBA*** to file an appeal with the procuring agency when there is a disagreement.

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Bundling and Consolidating the SBA's Procurement Center Representative Role Defined

The SBA's Procurement Center Representative ("PCR") Role is Defined to include:

The ability to review any bundled or consolidated solicitation or contract in accordance with the Small Business Act.

The SBA clarified that PCRs advocate, to the maximum extent practicable, the use of small business concerns in Federal Contracting, including advocating against the unjustified consolidation or bundling of contract requirement.

PCRs will also consult regarding in-sourcing work.

PCRs may also receive unsolicited proposals from small business concerns and to provide those proposals to the appropriate agency's personnel for review and disposition.

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Other Changes

And you know there were

Definition of Joint Venture

Joint venture may be a formal or informal partnership or exist as a separate limited liability company or other separate legal entity.

However, regardless of form, the joint venture must be reduced to a written agreement.

If JV exists as a separate legal entity, it cannot be populated.

Separate legal entity joint venture may have its own separate employees to perform administrative functions, but not to have its own separate employees to perform contracts awarded to the joint venture.

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Definition of Joint Venture

Several commenters disagreed: a populated joint venture has its own lower indirect costs, making the company more competitive and reducing the cost to the Govt.

SBA continues to believe that a small protégé firm does not adequately enhance its expertise or ability to perform larger and more complex contracts on its own in the future when all the work through a joint venture is performed by a populated separate legal entity.

Several comments opposed the provision that identified informal joint ventures as partnerships, but SBA continues to believe that state law would recognize as partnerships.

Proposed rule also required joint venture partners to allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, to access its files and inspect and copy records and documents when necessary.

- Several commenters requested SBA to clarify that the access should be limited to documents and records relating to the joint venture, not to unrelated documents of the joint venture partners themselves.
- SBA agrees.

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Tracking Awards to Joint Ventures

SBA does not seek to impose any unnecessary burdens on small business.

Additional reporting is not necessary.

Some sort of joint venture identification is required.

Requires joint ventures to be separately identified in SAM so that awards to joint ventures can be properly accounted for.

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RECONSIDERATIONOF DECISION OF SBA'S OHA

Permits SBA to file a request for reconsideration in an OHA proceeding in which it has not previously participated.

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8(a) BD Application Processing

Final Rule provides that IRS Form 4506T, Request for Copy or Transcript of Tax Form, is not needed in all cases.

SBA always has the right to request any applicant to submit specific information that may be needed in connection with a specific application.

Final Rule final rule amends § 124.202 to require applications to be filed electronically, with the understanding that certain supporting documentation may also be required under § 124.203

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8(a) BD Application Processing

Final Rule has eliminated the requirement for a wet signature.

As long as applicants know that the individual(s) upon whom eligibility is based take responsibility for the accuracy and truthfulness of any information submitted on behalf of the applicant, an electronic, uploaded signature should be sufficient.

If during the processing of an application, SBA receives adverse information regarding possible criminal conduct by the applicant or any of its principals, SBA's current regs require SBA to automatically suspend further processing of the application and refer it to SBA's OIG for review. Final rule provides necessary discretion to SBA to allow SBA to determine when to refer a matter to the OIG.

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Change in Primary Industry Classification

Since no current requirement that a newly admitted Participant actually perform most, or any, work in the six digit NAICS code selected as its primary business classification in its application, tribe/ANC/NHO/CDC could end up owning 2 (or more) firms actually operating in the same primary NAICS code.

Proposed rule allowed SBA to change the primary industry classification contained in a Participant's business plan where the greatest portion of the Participant's total revenues during a three-year period have evolved from one NAICS code to another.

- Revenues from primary code must exceed those from any other code (not that they must exceed 50% of firm's revenues).

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Change in Primary Industry Classification

SBA agrees with the commenters that SBA should not change a Participant's primary NAICS code without discussion back and forth between SBA and the Participant.

- Where SBA believes that a Participant's revenues for a secondary NAICS code exceed those of its identified primary NAICS code over the Participant's last three completed fiscal years, SBA would notify the Participant of its belief and ask the firm for input as to what its primary NAICS code is.
- SBA would be looking for a reasonable explanation as to why the identified primary NAICS code should remain as the Participant's primary NAICS code.
- The Participant should identify: all non-federal work that it has performed in its primary NAICS code; any efforts it has made to obtain contracts in the primary NAICS code; all contracts that it was awarded that it believes could have been classified under its primary NAICS code, but which a contracting officer assigned another reasonable NAICS code; and any other information that it believes has a bearing on why its primary NAICS code should not be changed despite performing more work in another NAICS code.

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Change in Primary Industry Classification

For entity-owned firm, second, newer firm be permitted to continue to participate in the 8(a) BD program, but not be permitted to receive any additional 8(a) contracts in the six-digit NAICS code that is the primary NAICS code of the other 8(a) Participant

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Benefits Reporting

Changes the timing of benefits reporting from the time of a Participant's annual review submission to the time of a Participant's annual financial statement submission.

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QUESTIONS??

Clear as mud?