



Mentor-Protégé Joint Ventures

To capitalize on the benefits, participants must avoid common pitfalls.



BY STEPHEN BACON

There are currently more than 1,600 active mentor-protégé agreements (MPAs) approved by the Small Business Administration (SBA). That number continues to rise because the SBA's "All-Small" Mentor-Protégé Program (ASMPP) offers various benefits to its participants. Most notably, the ASMPP allows participants to form joint ventures that are eligible to compete for small business set-aside contracts.

In recent years, mentor-protégé joint ventures (MP-JVs) have become critically important to surviving and thriving in the federal marketplace. Small business protégés can improve their standing in set-aside competitions by leveraging their mentor's capabilities, past performance, and experience. Moreover, mentors can participate in MP-JVs to capture a portion of set-aside contract revenues that would otherwise be unavailable

to large businesses.

Although many contractors are aware of the compelling advantages to be gained by forming an MP-JV, fewer understand or fully appreciate the risks associated with this unique teaming arrangement. Unlike a traditional joint venture, the contents of an MP-JV are prescribed by SBA regulations that require the inclusion of specific terms.

Failure to adhere to those

regulations can have devastating consequences. Indeed, an MP-JV may be deemed ineligible for a set-aside contract it otherwise would have won if the joint venture agreement (JVA) was not properly formed in accordance with SBA regulations. The SBA Office of Hearings and Appeals (OHA) strictly construes the relevant regulations and will disqualify an MP-JV if the i's are not dotted and t's are not crossed.

An MP-JV's non-compliance with regulations during the contract execution phase also can expose the JV partners to adverse contractual, administrative, and legal consequences. This includes terminations for default, suspension and debarment actions, and liability under the False Claims Act (FCA).

Affiliation Ground Rules

To understand the benefits of an MP-JV, it is necessary to first understand the affiliation rules that apply to other types of teaming arrangements, such as a traditional JV or a prime-sub relationship. If two entities are "affiliates," the SBA will combine their revenues when determining whether the awardee meets a set-aside contract's size standard.¹

JV partners are considered affiliated for purposes of a size determination made in any procurement in which the JV is the offeror.² This means that Company A and Company B cannot form a JV to compete for a set-aside contract if their combined revenues would exceed the size standard for eligibility.³

Unlike in a traditional JV, a prime contractor is not automatically



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affiliated with its subcontractors. But the SBA may find that a prime contractor is affiliated with its "ostensible subcontractor" through the size protest process.

The SBA may find "ostensible subcontractor" affiliation if the subcontractor will perform the "primary and vital" requirements of the work, or if the prime contractor is "unusually reliant" on the subcontractor.⁴ The risk of an affiliation finding is particularly acute where the subcontractor is a large business that was previously the incumbent and/or has significantly more experience with the type of work at issue.

MP-JV Benefits

A key benefit of the MP-JV structure is that it mitigates the risk of an affiliation finding that could render another type of teaming arrangement, such as a traditional JV or prime-subcontractor relationship, ineligible for award under the rules discussed above. The so-called "affiliation shield" precludes a finding of affiliation "between a protégé firm and its mentor based solely on the mentor-protégé agreement or any assistance provided pursuant to the [mentor-protégé] agreement."⁵

The formation of an MP-JV is a form of "assistance" that is generally excluded from the normal affiliation rules. As a result, MP-JVs are not subject to the normal rule that makes traditional JV partners affiliated for purposes of determining size when the JV is the offeror.

ASMPP participants must meet three conditions to qualify for the exception to affiliation between JV

partners. First, the SBA must approve the mentor-protégé agreement before the MP-JV may submit an offer.⁶

Second, the protégé must meet the applicable size and status eligibility requirements for the set-aside contract in question.⁷ And, third, the MP-JV's joint venture agreement (JVA) must include various terms required by SBA regulations.⁸

In addition to the affiliation shield, the ASMPP regulations give the mentor-protégé team greater flexibility to allocate workshare as compared to a prime-subcontractor team. The Limitation on Subcontracting clause permits a small business prime contractor to subcontract a limited percentage of the contract's value to large businesses or other small businesses that do not meet the contract's set-aside eligibility requirements (i.e., "non-similarly situated" entities).⁹ In a services contract, for example, subcontractors cannot receive more than 50% of the amount paid by the government.¹⁰

The ASMPP regulations provide that the small business protégé must perform at least 40% of the work performed by the MP-JV and that work must be "more than administrative or ministerial functions."¹¹ Thus, the mentor may perform up to 60% of the MP-JV's work, which is 10% more than it would normally be allowed to perform as a subcontractor under a prime services contract.

Avoid Size Protest Disaster

When a procuring agency identifies an MP-JV as the apparent successful offeror, a competitor may challenge

the MP-JV's eligibility for award by filing a size protest. As part of the size determination process, the SBA will scrutinize the contents of the JVA to ensure that it includes the required terms. SBA OHA decisions reveal that numerous MP-JVs have been disqualified for failing to execute a compliant JVA.¹²

JVAs may be deemed non-compliant for omitting any of the contents specifically required by the applicable regulations. The required JVA contents are set forth in the SBA regulations that apply to each socioeconomic category.¹³ The terms required include, for example, a provision that identifies a named employee of the protégé as the contract's "Responsible Manager," and a provision that grants the protégé small business at least 51% ownership in the MP-JV.¹⁴

Although some of the required terms can be addressed without regard to any particular solicitation, several critical terms must be tailored to each procurement opportunity. These procurement-specific terms are frequently overlooked or improperly drafted by mentors and protégés, resulting in a finding by the SBA that the MP-JV is ineligible for award.

For each procurement opportunity, the JVA must specify the responsibilities of the mentor and protégé "with regard to negotiation of the contract, source of labor, and contract performance," including a description of how the MP-JV will meet the ASMPP's workshare requirements.¹⁵

The regulations recognize that it is often difficult or impossible to include this level of specificity for "an indefinite quantity contract or



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multiple award contract where the level of effort or scope of work is not known.”¹⁶ In that situation, the JVA may include a more general description of the parties’ anticipated responsibilities.¹⁷ The regulations include a similar provision that requires JVAs to itemize “all major equipment, facilities, and other resources to be furnished by each party to the joint venture.”¹⁸

MP-JVs commonly do not address these requirements with adequate specificity and in a manner that is tailored to the solicitation’s requirements. In many cases, the parties rely on generic template language when the MP-JV is formed and fail to update the JVA in an addendum when the

MP-JV decides to pursue a specific set-aside opportunity.

The JVA must be compliant at the time the MP-JV submits its final proposal.¹⁹ MP-JVs that neglect to include the appropriate terms in their JVA cannot amend or supplement its terms after a size protest is filed. The SBA will not consider such “after-the-fact” changes to the JVA in determining the MP-JV’s eligibility.

The lesson for MP-JVs is to treat compliance with JVA regulatory requirements as you would treat compliance with the requirements of a solicitation. As many MP-JVs have learned, inattention to the contents of a JVA can have disastrous consequences if a size protest is filed.

Mitigate Compliance Risks

An ineligibility finding is not the only risk associated with a noncompliant JVA. Failure to comply with the requirements of the ASMPP regulations also can result in serious contractual and legal consequences for an MP-JV and its partners.

Prior to performing a set-aside contract, MP-JV partners must certify that they have entered into a compliant JVA and will perform in accordance with its terms and the mentor-protégé workshare requirements.²⁰ The protégé also must submit an annual report to the relevant contracting officer and the SBA regarding the MP-JV’s compliance with those requirements.²¹ After



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contract completion, the protégé and the mentor may be required to expressly certify that they complied with the workshare requirements and performed in accordance with the JVA.²²

The regulations encourage individuals to report any information regarding MP-JV noncompliance to the SBA and/or the SBA Office of Inspector General.²³ In addition to MP-JV noncompliance, the SBA also may scrutinize a mentor's failure to assist the protégé under the MPA.

A reported noncompliance issue may trigger an investigation into the MP-JV's contractual performance and/or the sufficiency of the mentor's assistance. These investigations may lead to various adverse actions against the MP-JV and its partners by contracting officers, the SBA, agency suspension and debarment officials, or the Department of Justice (DOJ).

A contracting officer could potentially terminate an MP-JV's contract for default or convenience in the event of a noncompliance issue, which could also trigger a negative performance evaluation. If the mentor does not provide the assistance it promised under the MPA, the SBA may recommend that the agency issue a "stop work" order to the MP-JV and "authorize a substitution of the protégé firm for the joint venture."²⁴

The SBA also may terminate the MPA, which automatically excludes the mentor from participating in the ASMPP for two years.²⁵ Moreover, a mentor's lack of assistance or an MP-JV's failure to comply with the JVA may be grounds for a suspension or debarment action against the MP-JV entity, the partners, and responsible owners or executives involved.²⁶

Finally, an MP-JV's failure to comply with ASMPP requirements

could give rise to FCA liability. An MP-JV and its partners could be liable under the FCA for improperly obtaining a set-aside contract through false certifications regarding their eligibility. FCA liability also can attach to fraudulent conduct related to the formation of the MP-JV or the execution of a set-aside contract in violation of the ASMPP's workshare requirements.

DOJ can pursue civil or even criminal FCA actions against companies and individuals that undermine the goals of the ASMPP by using an MP-JV entity as a "front" for a large business to perform the majority of work under a set-aside contract.

MP-JVs and their partners should have systems in place to ensure that they are compliant with ASMPP eligibility requirements and the applicable workshare requirements. At a minimum, this means preparing compliant JVAs to pursue set-aside opportunities, implementing mechanisms to track the allocation of work during contract execution, and ensuring the accuracy and completeness of reports submitted to the SBA and relevant contracting officers.

Conclusion

MP-JVs have reshaped the competitive landscape for small business set-aside contracts. Indeed, for some set-aside opportunities, standalone small businesses may not be able to realistically compete against MP-JVs that can leverage the capabilities and experience of a large business.

These dynamics are likely to fuel greater use of MP-JVs as more

companies seek to capitalize on the inherent advantages of this unique teaming structure. Companies that pursue the benefits of an MP-JV should not lose sight of the risks associated with forming these entities and using them to perform contracts set aside for small businesses. **CM**

The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

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ENDNOTES

- 1 13 C.F.R. § 121.104(d)(1).
- 2 13 C.F.R. § 121.103(h).
- 3 JV partners also may generally be affiliated for a procurement in which the JV entity itself is not competing. Specifically, the SBA will find JV partners to be affiliated if the JV continues to submit offers after two years from the date of its first award. See 13 C.F.R. § 121.103(h). The JV partners can usually avoid the impact of this rule by creating a new JV entity to pursue opportunities after the two-year period expires. The regulation notes, however, that "a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them." *Id.*
- 4 See, e.g., *Size Appeal of Contego Environmental, LLC*, SBA No. SIZ-6054, at 8 (2020); see also 13 C.F.R. § 121.103(h)(2).
- 5 13 C.F.R. 125.9(d)(4).
- 6 13 C.F.R. § 125.9(d)(1)(i).
- 7 13 C.F.R. § 125.9(d)(1)(iii).
- 8 13 C.F.R. § 125.9(d)(1)(ii).
- 9 FAR 52.219-14(e).
- 10 FAR 52.219-14(e)(1).
- 11 13 C.F.R. § 125.8(c).
- 12 See e.g., *Matter of Gray Venture, LLC*, SBA No. VET-276 (2022); *CVE Protest of KTS Solutions, Inc.*, SBA No. CVE-146-P (2020); *Size Appeal of DSC-EMI Maintenance Solutions, LLC*, SBA No. SIZ-5891 (2018); *Matter of ASIRTek Fed. Servs., LLC*, SBA No. VET-269 (2018); *Size Appeal of IEL-Cityside, JV*, SBA No. SIZ-5664 (2015); *Size Appeal of Kisan-Pike, A Joint Venture*, SBA No. SIZ- 5618 (2014).
- 13 See 13 C.F.R. § 125.8(b); 13 C.F.R. § 124.513(c); 13 C.F.R. § 125.18(b)(3); 13 C.F.R. § 126.616(c); 13 C.F.R. § 127.506(c).
- 14 See, e.g. 13 C.F.R. § 125.8(b)(2)(ii)-(iii).
- 15 See, e.g. 13 C.F.R. § 125.8(b)(2)(vii).
- 16 *Id.*
- 17 *Id.*
- 18 See, e.g. 13 C.F.R. § 125.8(b)(2)(vi).
- 19 13 C.F.R. § 121.404(d).
- 20 13 C.F.R. § 125.8(d).
- 21 13 C.F.R. § 125.8(h)(1).
- 22 13 C.F.R. § 125.8(h)(2).
- 23 13 C.F.R. § 125.8(j).
- 24 13 C.F.R. § 125.9(h)(1)(iii).
- 25 13 C.F.R. § 125.9(h)(1)(i)-(ii).
- 26 13 C.F.R. § 125.9(h)(2); 13 C.F.R. § 125.8(i).

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