



U.S. Small Business  
Administration

# Understanding Joint Ventures

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# Joint Venture Definition

13 C.F.R. §121.103(h)

- An association of individuals and/or concerns with interests in any degree or proportion
- consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period
- for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally

# 3-over-2 rule

13 C.F.R. §121.103(h)

- May not be awarded more than 3 contracts over a 2 year period
  - Otherwise, deemed affiliated for all purposes
  - 3-over-2 rule applies outside of 8(a)
- Once a joint venture receives one contract, applies as of the date of initial offer including price
  - May be awarded more than three contracts where the joint venture had received two or fewer contracts as of the date it submitted one or more additional offers which result in one or more additional contract awards.
  - May create additional joint ventures, and each new joint venture entity may be awarded up to three contracts. Longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them.

# Additional JV requirements

13 CFR 121.103(h)

- JV agreement must be in writing
- JV may not be populated with contract-performing employees
  - Administrative employees are OK
- Must be separately identified in SAM as a JV

# All-Small Mentor-Protégé Program

13 CFR 125.9

- Designed to enhance the capabilities of protégé firms by requiring approved mentors to provide business development assistance to protégé firms and to improve the protégé firms' ability to successfully compete for federal contracts.
- Assistance may include
  - technical and/or management assistance;
  - financial assistance in the form of equity investments and/or loans;
  - subcontracts (either from the mentor to the protégé or from the protégé to the mentor);
  - trade education; and/or
  - assistance in performing prime contracts with the Government through joint venture arrangements.

# All-Small Mentor-Protégé Program (cont.)

13 CFR 125.9

- Mentors encouraged to provide assistance relating to the performance of contracts set aside or reserved for small business so that protégé firms may more fully develop their capabilities.
- 8(a) mentor-protégé program remains in effect
- JV agreements for 8(a) contracts still require approval from district office (regardless of which program the JV partners are in)
- HUBZone JV rules align with other programs

# Functions of the ASMPP program office

- Program Office provides an online mechanism (Certify.SBA.gov) for small (Protégé) and large (Mentor) pairings to apply to become a recognized “team” that can form “joint ventures” defined as “small” – to compete for small business set-aside contracts in the federal government.
- ASMPP (All Small Mentor Protégé Program) is operated centrally at SBA HQ. All agreements are reviewed, approved and evaluated here. (No district office involvement is required)
- Review & evaluate online applications; approve or decline per rules and quality standards.
- Applicants may request reconsideration of denial

## Functions of the ASMPP program office (cont.)

- Collect annual reports and evaluate, quantitatively and qualitatively, the success of the program.
- Joint venture agreements are not reviewed and approved in the ASMPP (contrast to approval for 8(a) JVs at the District Office level.)



# Notes on applying to ASMPP

- Existing 8(a) firms in last 6 months of the 8(a) program wishing to transfer the MPA to ALL Small – online application (coordinating with 8(a) office to fine tune process) – no reapplication required
- Requiring upload of Business Plan; no financial statements or tax returns as part of application process.

# Affiliation Exclusion

- Approved mentor-protégé relationship provides an exclusion from affiliation
- ASMPP will not review and approve JV agreements
- JV structure can be protested in connection with procurement
- Once a firm qualifies as other than small for the size standard for its primary NAICS code, it will not be eligible for any further contracting benefits from its mentor-protégé relationship

# Mentor requirements

- Must be for-profit
- Mentor must demonstrate that it can fulfill its mentor protégé obligations
- Generally, a mentor will have no more than one protege at a time.
  - SBA may authorize a concern to mentor more than one protege at a time where it can demonstrate that the additional mentor-protege relationship will not adversely affect the development of either protege firm (e.g., the second firm may not be a competitor of the first firm).
  - Under no circumstances will a mentor be permitted to have more than three proteges at one time in the aggregate under the mentor-protege programs authorized by §§ 124.520 and 125.9
- Applies to entire corporate family, all affiliates/divisions
- Small business may be both a protégé and a mentor at the same time

# Mentor responsibilities

- Mentor that fails to provide assistance:
  - may result in termination of the agreement;
  - mentor prohibited from acting as mentor for two years;
  - SBA may request for agency to stop work and/or allow protégé to perform
  - May be grounds for debarment

# Protégé requirements

13 CFR 125.9(d)(1)

- Protégé must qualify as small for primary NAICS or secondary NAICS – applies to 8(a)
- Protégé may have up to 2 mentors in its lifetime in any program
- A protégé firm may generally have only one mentor at a time.
- SBA may approve a second mentor for a particular protégé firm where the second relationship will not compete or otherwise conflict with the assistance set forth in the first mentor-protégé relationship and:
  - (i) The second relationship pertains to an unrelated NAICS code; or
  - (ii) The protégé firm is seeking to acquire a specific expertise that the first mentor does not possess.

# Protégé requirements (cont.)

13 CFR 125.9(d)(1)

- Once a firm qualifies as other than small for the size standard for its primary NAICS code, it will not be eligible for any further contracting benefits from its mentor-protégé relationship

# More Mentor-Protégé changes

- 8(a) mentor/protégé may notify SBA that it is transferring relationship to small MP relationship after graduation
- Mentors may own up to 40% of protégé - will not be required to divest at end of relationship
- Mentor may transfer relationship to purchaser
- Size of an approved 8(a) JV may be protested

# Mentor-protégé relationship

- Relationship lasts 3 years, with 3-year extension, but reviewed annually to ensure protégé is receiving identified assistance and contracts are being properly performed by appropriate parties
- Past performance and experience of JV members or subs must be considered by the CO
- Protégé must identify all other mentor protégé relationships
- At the conclusion of a relationship, protégé must report on whether it benefitted



# Contract performance

- Protégé must perform 40% of work performed by JV, and 40% of aggregate performed by members of the JV at any tier
  - Joint Venture must certify it will comply with performance requirements, and report to SBA and the CO on performance

# Joint venture requirements (part 1)

1. Setting forth the purpose of the joint venture;
2. Designating a small business as the managing venturer of the joint venture, and an employee of the small business managing venturer as the project manager responsible for performance of the contract.
  - The individual identified as the project manager of the joint venture need not be an employee of the small business at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the small business if the joint venture is the successful offeror.
  - The individual identified as the project manager cannot be employed by the mentor and become an employee of the small business for purposes of performance under the joint venture;

## Joint venture requirements (part 2)

3. Stating that with respect to a separate legal entity joint venture, the small business must own at least 51% of the joint venture entity;
4. Stating that each participant must receive profits from the joint venture commensurate with the work performed by the concern;
5. Providing for the establishment and administration of a special bank account in the name of the joint venture.
  - This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. All payments due the joint venture for performance on a contract set aside or reserved for small business will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

## Joint venture requirements (part 3)

6. Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical.
  - If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

# Joint venture requirements (part 4)

7. Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical.
  - If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the small business partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

## Joint venture requirements (part 5)

8. Obligating all parties to the joint venture to ensure performance of a contract set aside or reserved for small business and to complete performance despite the withdrawal of any member;
9. Designating that accounting and other administrative records relating to the joint venture be kept in the office of the small business managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

## Joint venture requirements (part 6)

10. Requiring that the final original records be retained by the small business managing venturer upon completion of any contract set aside or reserved for small business that was performed by the joint venture;
11. Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and
12. Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

# Recent Litigation: ASIRTek Federal Serv.

*Matter Of ASIRTek Federal Services, LLC, SBA No. VET-269, 2018 WL 1778323*

- Issue: Where the joint venture agreement contemplated that the joint venture would bid for an 8(a) competitive contract, does the joint venture qualify for a future SDVO set-aside without entering into a new joint venture agreement?
- Held: No. The joint venture agreement must specify the responsibility of the parties for the contract at hand.



# Recent Litigation: Hendall, Inc.

*Size Appeal of Hendall, Inc., SBA No. SIZ-5888, 2018 WL 1241703*

- Issue: Where SBA approved a mentor-protégé agreement just shortly before the parties submitted a contract offer, should the parties be found affiliated under the totality of the circumstances?
- Held: No. The parties qualify for an exception to affiliation. Totality of the circumstances requires a showing that one firm controls the other, and contract-specific assistance does not establish control.

# Recent Litigation: Megen-AWA 2, LLC

*Size Appeal of Megen-AWA 2, LLC, SBA No. SIZ-5845, 2017 WL 3579823, recon. denied, SBA No. SIZ-5852, 20172017 WL 4638353*

- Issue: When a firm joint ventures with a firm owned by the owner's brother, does the exception to affiliation apply?
- Held: No. The firms may be affiliated under the identity of interest rule because their principals are brothers. The fact that the firms participate in joint ventures together supports the finding of affiliation.



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