

SBA Updates

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Small Business Administration

Government Contracting Area III



2013 National Defense Authorization Act (NDAA) regulations effective 30 June 2016

- Work performed by Similarly Situated Entities may count towards the applicable limitations on subcontracting.
- What is a “Similarly Situated Entity”?
 - Subcontractor that has same small business program status as the prime contractor.
 - Small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.
 - In order to count, work must be performed by subcontractor’s own employees.



Continued

- Services (except construction): the prime contractor will not pay more than 50% of the amount paid by the government to the prime to firms that are not similarly situated.
- Supplies/products (other than from a non-manufacturer of such supplies): the prime contractor will not pay more than 50% of the amount paid by the government to the prime to firms that are not similarly situated.
 - Cost of materials are excluded and not considered to be subcontracted



Continued



- Supplies from a non-manufacturer: the prime contractor will supply the product of a domestic small business manufacturer or processor, unless a waiver is granted
 - For a multiple item procurement where a waiver has not been granted for one or more items, more than 50% of the value of the products to be supplied by the non-manufacturer must be the products of one or more domestic small business manufacturers or processors.
 - For a multiple item procurement where a waiver is granted for one or more items, compliance with the limitation on subcontracting requirement will not consider the value of items subject to a waiver. As such, more than 50% of the value of the products to be supplied by the non-manufacturer that are not subject to a waiver must be the products of one or more domestic small business manufacturers or processors.
 - For a multiple item procurement, the same small business concern may act as both a manufacturer and a non-manufacturer.

NAICS CODES and the Limitation on Subcontracting

- When services and supplies are combined, the CO will select the appropriate NAICS code best describing the principal purpose of the product or services being acquired, and that NAICS code is determinative as to which limitation on subcontracting and performance requirement will apply to the prime contract.
- In no case will both a services and supplies/products calculation apply to the same procurement.
- The relevant limitation on subcontracting shall apply only to that portion of the contract award amount.
- NOTE: NAICS Code selections can be protested to the SBA.

Example of mixed services/supplies calculation

- Total Contract Value = \$3,000,000
- Supply = \$2,500,000*
- Services = \$500,000
 - *CO assigns manufacturing NAICS code
 - \$2,500,000 Supply Portion
 - - \$500,000 Cost of Materials
 - \$2,000,000 For calculation of LOS
 - 50% of \$2,000,000 = At least \$1,000,000 Performed by Prime or SSE Subcontractors

Example 2

- Total Contract Value = \$3,000,000
- Supply = \$500,000
- Services = \$2,500,000*
- *CO assigns service NAICS code
- \$2,500,000 Service Portion
- \$2,500,000 For calculation of LOS
- The prime and/or similarly situated entities must perform at least \$1,250,000 and the prime contractor may not subcontract more than \$1,250,000 to non-similarly situated entities.

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- Non-Manufacturer Rule: set-aside for small businesses, furnishes in the performance of the contract, the product of a small business manufacturer or producer.

Under the new rules, the SBA will not apply the non-manufacturer rule, which is an exception to the limitation on subcontracting, to the mandatory small business set-aside contracts valued between \$3,500 and \$150,000.



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- Joint Ventures: The parties to a joint venture are considered affiliates for all purposes, unless an exception exists or the joint venture receives no more than three contract awards over a two-year period.

New regulation: a joint venture of two or more concerns may submit an offer as a small business for any Federal procurement, subcontract, or sale, provided that each concern individually is small under the size standard corresponding to the NAICS code assigned to the contract without being deemed affiliated for size determination purposes.

(Similarly situated entities).

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- Calculation of Annual Receipts: Receipts means “total income” (or in the case of a sole proprietorship, “gross income”) plus “cost of goods sold” as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S and Schedule K for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 and Schedule K for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships).

New rules clarify that passive income is to be included when calculating annual receipts for size purposes. IRS classifies passive income as rental activity or trade or business activities in which you do not materially participate such as realized capital growth.

SBA position on FAR

- The Supreme Court's unanimous decision in *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016) concluded that the Department of Veterans Affairs (VA) violated the VA-specific statutory "rule of two" favoring veteran-owned small business concerns (VOSBs) when the VA failed to conduct VOSB market research before issuing Federal Supply Schedule (FSS) orders to a non-VOSB. (SC = GSA DO/TO's are contracts)
- The case represents the Supreme Court's first analysis of the FSS program and the "rule of two."
- Following the Supreme Court's June 2016 issuance of the decision in *Kingdomware*, SBA's position is that the Supreme Court's rationale should be applied broadly to similarly worded Federal statutes, including specifically section 15(j) of the Small Business Act, 15 U.S.C. & 644(j).
- This position would mandate that Federal Supply Schedule (FSS) orders between \$3,500 and \$150,000 be set aside for small business concerns (SBCs).
- PCRs have existing authority to review FSS purchases and to recommend that agencies set aside orders at any value.

NEW SBA MENTOR-PROTÉGÉ PROGRAM

- New program regulated under 13 CFR §125.9
- Patterned on existing 8(a) Mentor-Protégé program
- Designed as a business development tool
- Provide financial, technical, and/or management assistance
- Allows ALL small business protégés to joint venture with their large business mentors
- Mentor can own up to 40% of the protégé
- Exception to affiliation



Benefits

- Mentor-protégé joint ventures may qualify as a small business for any federal government contract or subcontract where the protégé qualifies as small for the size standard assigned to the procurement.
- Protégé firm shielded from a finding of affiliation where a large business mentor owns 40% of protégé.
- Once mentor-protégé relationship ends, any protection from affiliation also ends.
- Agencies may provide incentives in contract evaluation process to a firm that will provide significant subcontracting work to its SBA-approved protégé.

How to apply

- Newly created unit within Office of Business Development.
- Final decision making authority vested in AA/BD.
- Due to application volume/oversight, SBA may institute open enrollment periods in the future.
- 8(a) mentor-program remains separate and distinct
- Office of Business Development will continue processing 8(a) and small business mentor-protégé applications separately.
- 8(a) firms can apply to either office.

Applications

- Applications will only be accepted electronically using new online application available at certify.sba.gov.
- All documents (e.g., signed MPAs) to be uploaded to certify.sba.gov.
- SBA retains right to request financial statements and tax returns during reporting and evaluating process.
- Applicants required to register in SAM PRIOR to creating profile in certify.sba.gov.
- Applicants (both mentors and protégés) required to complete online training module and upload certificate of completion to certify.sba.gov BEFORE completion of application process.

Protégé eligibility

- Must be small under its primary NAICS code OR seeking assistance in secondary NAICS code under which it is small.
- May self-certify that it qualifies as small for its primary or secondary NAICS code.
- For secondary NAICS code approval, must demonstrate prior experience and logical business progression.
- Will approve a 2nd mentor only if:
 - 2nd relationship pertains to unrelated NAICS code AND
 - Protégé seeks to acquire specific expertise first mentor does not possess
- SBA may examine protégé's SDVOSB or WOSB self-certification as part of application process.

Mentor eligibility

- Must demonstrate capability of fulfilling obligations under mentor-protégé agreement
- May submit copies of federal tax returns, audited financial statements or, if publicly traded, SEC filings
- Possess good character
- Not suspended or debarred
- Impart value due to lessons learned and practical experience.
- Only for-profit firms for both 8(a) and new MP programs
- Can be any size
- Generally, no more than one protégé at a time
- Limit of three protégés at one time if there is no adverse impact on any protégé
- Protégés may concurrently serve as a mentor



Written MP Agreement

- Agreement must set forth assessment of protégé's needs
- Detailed description and timeline for the delivery of the assistance by the mentor which will enable protégé to meet its goals
- Minimum one year commitment
- Single point of contact for mentor responsible for managing and implementing the MPA
- Identify any other mentor-protégé relationship held by the protégé (either SBA or Agency)
- Written agreement approved by AA/BD
- Changes must be approved
- Either party may terminate with 30 days advance notice
- Reviewed annually by SBA –SBA may terminate at any time

MP participation period

- Up to three years in one agreement, maximum of six overall.
- Protégé may have two three-year MPAs with different mentors.
- EACH may be extended an additional three years.
- 8(a) approved mentor-protégé relationships may transfer to the new mentor-protégé program after graduating from the 8(a) program.
- 8(a) participants in last six months of their programs terms may apply for an 8(a) mentor-protégé relationship, as it could carry over to new small business mentor-protégé program.



Declined applications

- If SBA declines application, protégé may file request for reconsideration within 45 days.
- Able to revise MPA during reconsideration to provide additional information and documentation.
- SBA to issue reconsideration decision within 45 days – if declined again but for different reasons, protégé can submit new reconsideration request.
- If application is declined, proposed protégé cannot attempt to enter into another mentor-protégé relationship with the same mentor for a 60 day period.
- Can submit application with new mentor at any time.

Questions?