

[START OF TRANSCRIPT]

Kyle: Ladies and gentlemen welcome and thank you for joining today's web conference FY2019 First Wednesday Learning Series. Please note that all participant lines will be muted for the duration of the conference. You are welcome to submit written questions during the presentation and these will be addressed during the Q and A. To submit a written question, use the Chat panel on the right-hand side of your screen, choose All Panelists from the Send To drop-down menu. With that I'll turn the call over to Chris Ishan. Please go ahead.

Chris Ishan: Thank you Kyle. Hello everyone and welcome to the eighth session of SBA's First Wednesday Webinar Series for fiscal year 2019.

Did you know that more than half of Americans either own or work for a small business and that they create about two out of every three new jobs in the US each year?

Well every year since 1963 the President of the United States has issued a proclamation announcing National Small Business Week which recognizes the critical contributions of Americans, entrepreneurs, and small business owners. In an effort to recognize these top small businesses, entrepreneurs, small business advocates and champions, the US Small Business Administration hosts the National Business Week. This year the annual event is being held from May 5th through the 11th.

As part of National Small Business Week, the SBA takes the opportunity to highlight the impact of outstanding entrepreneurs, small business owners and others from all 50 states and US territories. Every day they're working to grow small businesses, create 21st Century jobs, drive innovation, and increase America's global competitiveness. For more information on the 2019 National Small Business Week please visit www.sba.gov/nsbw.

Now on to Slide Two.

For today's session we'll be focusing on joint ventures, and by the end of this program you should have a better understanding of this topic as well as the resources available to you. If you are new to our event, this is a webinar series that focuses on getting subject matter experts on specific small business topics such as joint ventures and having them provide you with valuable information you can use in the performance of your job. We appreciate you taking the time to participate in the FY19 Program, and we hope that you benefit from today's session.

Now for a little background on the First Wednesday Program. The program was initially created for contracting staff which is why the training was called 1102 First Wednesday. The 11 02 designated government series for contracting personnel was later dropped to be more inclusive of other GS series as federal agencies increased the requirements for non-1102s to obtain DAWIA or FAC-C certifications. Additionally, other federal buying activities, SBA staff, PTAC, and SBDC personnel who after hearing about this training requested access and were added to the list of participants. So that is why SBA's First Wednesday Program is aimed at federal government employees and other resource partners like PTACs and SBDCs.

Thank you to those of you who are repeat attendees, and welcome to those who are new to the program.

On to Slide Three.

As Kyle mentioned, I am Chris Ishan and I work as a procurement center representative or PCR in Kansas City, Missouri. This slide also has Glen Davis' information, unfortunately she is at an outreach event today so I too will be reading the questions submitted during the program and our speakers will address those at the end of today's session. We both work in Contracting, Government Contracting Area Four, and Slide Three includes our information.

On to Slide Four.

Please note that all lines are on mute however you may submit questions or technical issues in the chat box on your screen. Your questions may be submitted any time during today's session by entering them into the Chat Box and these questions will be addressed at the end of our speaker's presentation. To make sure your question doesn't get overlooked please ensure it is addressed to all panelists on the drop-down and not just to one individual.

As most of you know we have transitioned to WebEx and have been informed that some users may experience issues such as a blocked website or other error messages when attempting to access the conference login from their computer. If you're affected by this issue, please make sure you dial in and follow along with the slides provided in this email. We will ensure the page numbers are clearly stated so you can follow along. We are hopeful this issue will be resolved soon, and we apologize for any inconvenience.

Now if you're having any other technical issues please call the AT&T support desk at the following number:1-888-796-6118. This

telephone number is also included in the email invitation for today's program and on Slide Four of the PowerPoint presentation. Otherwise just keep listening in and follow along with the PowerPoint presentation.

For more SBA Small Business Program training and additional resources please visit the SBA Learning Center at www.sba.gov.

Slide Five.

Did you know that the Association of Procurement Technical Assistance Centers or APTAC hosts a website where they post the First Wednesday programs? Since these sessions are being recorded, you can re-listen to this program as well as previous sessions by visiting their website which is provided here on Slide Five. Additionally, Procurement Technical Assistance Centers or PTACs are a great resource in partnering with your local PTAC for an Industry Day, sharing RFI notices, or a source of... announcement **[00:05:52 inaudible]** or referring small business concerns to a PTAC are just a few reasons why they are such a useful resource for acquisition personnel. Please contact your local PTAC for additional information.

Slide Six is the Program Schedule for fiscal year 2019, and today's session on joint ventures is the eighth topic in the series. You will see that we have added a couple new topics to our program list and improved on other topics that we have presented in the past. You may see a slight change in the order of upcoming topics, however an email invitation for the next session will be sent out in a few weeks so please keep a lookout for this information.

On Slide Seven. I'm sure that many of you will want to receive credit for today's training so you'll be glad to know that today's session is worth one CLP. On the following slide, which is Slide Eight, you will find the training certificate and I will go over the instructions at that time.

Several of you may have received the information for this training from a friend or colleague, but if you want to receive an email directly from us notifying you of upcoming First Wednesday webinar events just email us at sbalearning@sba.gov. That is S-B-A-L-E-A-R-N-I-N-G at S-B-A dot G-O-V. In the subject line please enter the words "Add to list" and we'll ensure you're added to the distribution list.

On Slide Eight you'll see the certificate. First, you'll need to access the PowerPoint presentation that was part of the SBA email

invitation you received for today session, then go to Slide Eight. You'll manually fill in your name where it states, "Insert your name here." Next, within the print settings you will select "Print current slide" which will allow for only the certificate to be printed. Once this is done you can coordinate the CLP achievement through your training program or coordinator. Please note that SBA does not track your CLPs or communicate with your training program coordinator regarding your CLP achievements.

On to Slide Nine.

Today's training has been assembled to address joint ventures as well as provide you with additional resources available for your use. Our speakers have graciously accepted our invitation and they'll be directing me to continue on to the next slide. As mentioned earlier if you are unable to access WebEx please follow along with the PowerPoint presentation that was included in the email for today's training. We will identify the page number so you can follow along. Also, please note that some viewers may experience a delay as the slide changes on your screen.

Now I am pleased to introduce today's speakers to you. Miss Valerie Coleman who is the Prime Contracts Program Manager for SBA's Office of Government Contracting, and Miss Esmeralda Sanchez who is SBA's Size Program Manager in Area Six. We appreciate that both of you can meet with us today and I'll turn the program over to you now.

Valerie Coleman:

Thank you Chris. In November we did a webinar on size and we want to follow up in January with a topic on joint ventures and affiliation because we've gotten a lot of questions about that. But then a little thing called the "solo hopping" and we have to change up some schedules. So, Esmeralda and I are very pleased that we can present this topic to you today.

We should be on Slide 10, and these are the topics that we're going to be talking about today on why small businesses do joint ventures, and then really get into the meat of size and affiliation when dealing with JVs; and then we will also talk about the Mentor, protégé versus the Eight-A Program; and then which parts of the JV should you be looking at as a contracting officer to make sure that you start a very good and valid and complete joint venture; and then we will talk about protests.

Next slide.

So, let's talk about the policy of the government. We all want to do maximum practical opportunity to small businesses, and so that includes your small business, your small disadvantaged business are a subset of SDB is the Eight A Program, HUB Zone small business; Women-owned, and a subset of Women-owned is your EDWOB, so Economically Disadvantaged Women-Owned Small Business; Veteran, and a subset of that service, Disabled Vet.

Next slide.

Chris Ishan:

Slide 12

Valerie Coleman:

So, what if they fail a portion, of course we have the small business goal of 23% and then SDB which does include Eight A Aside; Women, which includes EDWOB, Aside, HUBZone Three and Service Disabled Vet Sub Three.

There is no formal statutory goal for government small business, it is in subcontracting but not in prime contracting [00:10:49 inaudible].

Next slide.

Chris Ishan:

Slide 13.

Valerie Coleman:

So why joint ventures? Contracts are getting bigger and bigger and bigger, and so to maintain competition and to allow small businesses to compete we encourage joint venturing. They can have the contract relationship a lot of times, but a joint venture sometimes will help small businesses when they combine their efforts, their equipment, their financial capacity, things of that nature, and so we always want to encourage a joint venture if it's something that both parties are ...[00:11:29 inaudible] two people, sometimes through a joint venture if they all want to participate and it works well for them.

Next slide.

So, what are the benefits to a small business? Well the first thing is they're going to gain new capacity and expertise. Working with someone else who does not have the capability that they have to perform work and will help to encourage them to grow and learn new things, gain that new capacity so maybe later on down the road they will not need to joint venture. We always encourage the small business looking at a small [00:12:08 inaudible] to look at their strengths, but also be very honest and upfront about what your weaknesses are because you want to joint venture, if you're going to go that way, with another business that will complement those weaknesses and help you overcome them. It will also combine your

capability from the past performance that you may have. It does increase your...and your value and your capacity, and one of the chief things that going in initially is if you have a joint venture, the small business has to maintain or have ownership of at least 51%. They're not going to be, say, a hundred percent of the risk, they have the 51, and it's on a short time frame. Normally that happens when a contract expires that joint venture expires also, short time-frame basis.

Next slide.

Chris Ishan:

Slide 15.

Valerie Coleman:

So, what is the definition of a joint venture? We've given you the **[00:13:04 inaudible]** regulation reference ...for you to look at, and I'm not going to read the slides because you guys know how to read. But the basic thing is it combines the effort, it combines the money, the skill and the knowledge, and it's not on a continually or permanent basis. For the most part it does restrict you to three specific awards over a two-year period.

Next slide.

Chris Ishan:

Slide 16

Valerie Coleman:

Here's some of the things that Esmeralda is going to talk about, it consists only of small businesses, with the exception of Eight A and the all small Mentor-Protégé Program. **[00:13:46.02 Inaudible]** ...that it gets small and it is subject to any regulation just like if it was a single small business. The main thing on the joint venture is SBA, except for the Eight A Program does not review joint ventures, it is reviewed by the contracting officer. So, to get you started on the rest of affiliation and everything else, I'm going to turn it over to Esmeralda for her to talk to you more about size.

Esmeralda Sanchez:

Next slide. Thanks Val.

Well first of all we're going to find out what is a small business. SBA defines a small business as an entity that is organized for profit; that has a place of business in the US by operating primarily in the US or that by providing significant contribution to the US economy by taxes or use of American products or labor. The entity may not exceed the small business size assigned to the procurement, either the small business developing size standard or the employee base size standard.

An entity may be small for one NAICS Code but it may be other than small for another, and a business may have more than one NAICS

Code, however it needs to identify a primary NAICS Code and it would essentially identify its size based on the size standards that have been applied to the industry codes. If you'll go to the next slide.

Chris Ishan: Slide 18

Esmeralda Sanchez: Yes. SBA does have a...size standard which it publishes on 13 CFR 121.201 in which it applies a different size standard to various industries. Now the industries are applied either as revenue-based size standard or an employee-based size standard. NAICS Code, an industry does not have two size standards, it's either revenue or employee, not both. Next.

Chris Ishan: Slide 19

Esmeralda Sanchez: Thank you. So, determination of the size depends on the number of affiliates. So, what are affiliates? Affiliates are entities that are controlled by the same person or the same entity. We look at the different bases, for instance we look at common ownership, management, we look at any identity of interest like close family members; we look at common investments by individuals or entities. We also look at whether an entity is dependent on another entity through contractual relationships. We might look at a newly organized concern when some former officers or key personnel in one entity then serves as officers or key personnel in another entity. We look at franchise and license agreements, and we also look at job inventories.

Next slide.

So how does SBA calculate receipts? We typically look at the three-year average for the last completed fiscal years, three fiscal years. We use federal tax returns, and we will take the annual receipts for all affiliates and combine them with... **[00:18:39 inaudible]**

Now some of you are aware of the Small Business Runway Extension Act of 2018, this proposed legislation will eventually change the calculation from the average of three completed fiscal years to the average of five; however this proposed regulation is undergoing regulatory process, and so once this process is complete SBA will change its calculations. Until that regulatory process is complete, we will continue using the calculation based on three years.

Next slide.

Chris Ishan: Slide 21

Esmeralda Sanchez:

SBA calculates the number of employees by counting all individuals employed on a full time, part time basis, or employees are paying through a temporary employment agencies. We look back at 12 complete months prior to the date SBA determines size. We actually do a running average of the number of employees, and what we do look for is information from official pay records and in some cases, we might ask for quarterly IRS Form 941 to make it easier to submit documentation.

Next slide.

There are typically two types of affiliation, general affiliation which is typically the most common, it's basically an ongoing basis, it's determined by common ownership that management control, economic dependence, franchise agreements, et cetera. They apply to the company in all business transactions. There are instances in which we will fund affiliation for the procurement of hands. In these instances, generally we look at non-manufacturer rule requirements and whether the requirements for joint ventures are completely matched. Slide.

Chris Ishan:

Slide 23

Esmeralda Sanchez:

SBA requires that joint ventures be in writing and registered in SAM. They must be organized for specific and limited purpose, they may not be populated, which means they cannot have their own employees. SBA wants to know what entity is supplying their employees. Each joint venture may be awarded up to three contracts over a two-year period. Anything beyond three may be determined to be ongoing affiliation.

Next slide.

As a general rule on joint ventures, JV partners in a procurement are always affiliated with respect to that procurement. There are exceptions to this rule, there are two main exceptions to this rule and those exceptions are the following.

A JV may participate as a small business if the JV partners are each small under the size standard of NAICS associated with the procurement; and Two, if the JV members are part of an approved mentor-protége relationship and the mentor-protége agreement and the JV meets certain requirements the JV may be considered a small business for the procurement.

Next slide.

Chris Ishan:

Slide 25

Esmeralda Sanchez:

Next slide will provide a few examples on joint ventures and whether they may or may not be eligible for an exception to affiliation based on joint ventures.

The first one would be an example of a joint venture between a firm, Firm A that has average annual sales of eight million; and Firm B that also has an average annual sales of...average revenues of eight million. This joint venture wants to compete as a small business for a procurement that has an assigned NAICS Code of say...I'll just identify this, 541620 which has a size standard of 15 million; and a JV with combined receipts of 16 million compete as a small business JV for a set aside with size standard of 15 million.

Well under the general rule, JV rule, which states that JV members are affiliated with respect to that procurement, they would not be. With 16 million they would exceed the size standard, the 15 million size standard; however, under the exception provided under 13 CFR121 103 H31 because each of the JV members has receipts that meet the 15-million size standard they are eligible. This JV in particular is eligible for an exception to affiliation that is allowed to certain small businesses and certain JVs.

Next slide.

In this example we're going to have the same NAICS Code, the same size standard for the procurement, 15 million. A JV made up of Firm A with average receipt of seven million, and Firm B with average receipt of eight million, have some combined receipts of 15 million. So, in this case under the general JV Affiliation rule they would be eligible to compete as a small business. Their combined receipts meet the 15 million size standard and so no exception would be needed.

Next slide.

Chris Ishan:

Slide 27

Esmeralda Sanchez:

In this example we have the same size standard, same NAICS Code, two firms. Firm A has average annual receipts of two million; and Firm B has average annual receipts of 15 and a half million. Under the general joint-venture rule their combined receipts of 17 and a half million would exceed the 15 million size standard assigned to the procurement so they would be ineligible under that general rule.

Then we can look at perhaps some exceptions. Under the exceptions afforded under H31, Firm A would meet the size standard; however Firm B has receipts that exceed the 15 million so they would not be eligible for the first exception under H31.

This JV would not be eligible to compete for this procurement unless they're part of an approved mentor-protégée relationship which Valerie will discuss a bit later, what is required of a JV to comply with this regulation.

Next slide.

Chris Ishan:

Slide 28

Esmeralda Sanchez:

In this case again, same size standard, same NAICS Code. In this case both entities are eligible to meet the size standard, and so under the general rule they're affiliated and they have combined receipts of 26 million, but because each of them has receipts that meet the 15 million size standard they would be eligible for the exception afforded under H31.

Next slide.

So, a joint venture submitted by an SBA-approved mentor and protégée may bid on fellow procurement as a small business if the protégée is small. This is part of the second exception to Affiliation Four, certain joint ventures. However, the business...well first of all the protege must be small and SBA must approve the mentor-protégée before the offer. Also, the JV agreement must meet certain requirements under Regulation as stated here, 13CS5125.9. If there is a protest the JV agreement will need to meet the requirements established in this regulation.

Next slide.

For Eight A procurements a JV may compete as a small business if the protégée is small and if the SBA has approved the MPA, a mentor-protégée agreement and their joint-venture agreement.

Valerie is going to speak next to what should be in this joint-venture agreement.

Chris Ishan:

Slide 31

Valerie Coleman:

Thank you Esmeralda. So, one of the things that she was mentioning is that in a protest the joint-venture agreement must have certain sections to it, and as a contracting officer you want to make sure that everything is covered under a joint venture. So, with that we'll go over some of the provisions that must be in a joint venture agreement when you see it.

So, the first thing is setting out the purpose of the joint venture, and normally that's ...known as "specific solicitation." And so, the first provision would say that ABC and XYZ are forming JKL to bid on

Solicitation Number..." whatever it is for whatever it is... service is being provided, and the location of where it's at.

The next thing is the small business must be... the manager is central in this, an employee of this entity, and they're going to be the person responsible for the performance of the contract. We also have had the ownership of the joint venture partners, the owner of the small business, either singular or several small businesses...75% of the joint venture and they also state... new office. **[00:32:39 inaudible]**

There also should be a special bank account, this is very important. One of the things that I've always taught small businesses is when we establish that special bank account because when you're going to do a contract for the federal government as a joint venture, the money paid by the federal government is not going to go into the account of ABC, it's not going to go into the account of XYZ, it's going in to the account of JKL which is the joint venture that was formed for this. So, there is a different bank account for the joint venture.

One of the things I've always suggested, and I think it's now probably the provision, is that there must be at least three signatures on the account. You do not worry about who's going to be putting money in the account, but both parties to the joint venture should be focused on the role of what money is going out. So, I've always said that if there are two parties to the joint venture then there should be three signatures, one from each party and **[00:33:38 inaudible]** ...for every one is the role of the money that's going out of the special bank account.

Next slide.

Chris Ishan:

Val we're getting some feedback that other people can't hear you, so if you could get a little...perfect. Slide 32 is what we're on.

Valerie Coleman:

Alrighty. So there has to be a provision listing all the equipment that each party is bringing into the joint venture and then how you're going to distribute the equipment if you have to buy any. I'm going to give you a simple examples is you're going into a job and during that you're allowed to buy nine computers, before going to each one but what happens to the ninth one? You can't pop it in now. So does one party say, "I'll pay for the other one," or how is that going to work? So, you need to schedule ... **[00:34:30 inaudible]** amount.

You also have to have a provision specifying the responsibilities of all the parties to the joint venture, and you also have to have a

provision that obligates all the parties to the joint venture. Then also you have to have a provision for keeping the records, administration and financial records of the joint venture. You do have to keep it for a certain number of years after the end of the joint venture. So, you need to have all of those, and you have to keep all of your records.

Next slide please.

So, you have a provision stating that financial statements will be submitted to SBA no later than 45 days after each operating quarter of the joint venture. We do monitor them under Eight A and the HUBZone Mentorship Program.

A provision for handling substitution or addition of co-venturers. Let's say they don't get along and you're going to have to bring somebody in, how do you do that? And definitely how to handle disputes and the termination of the joint venture. Both parties are still obligated to complete the federal contract even though they get into a dispute, so how are you going to handle that? Does one... or the other person... [00:35:55 inaudible] and how do they do that? Then just a couple of more.

Next slide please.

Chris Ishan:

Slide 34

Valerie Coleman:

So, performance of work. So, the basic understanding is that the small business partner to the joint venture must perform at least 40% of the work performed by the joint venture. So, let's say that you have on limitations to subcontracting that you have to do 15%, so the joint venture has to do 15% and the small business to the joint venture must do 40% of the 15. It has to be more than just administrative and managerial, it has to be something that's going to give him a lot of experience. It has to be work done by the partners will be aggregate; and again, it has to be at least 40% of the total done by the partners.

So those are the basic provisions that need to be in a joint venture when you get it. So, I'm going to turn it over to Esmeralda to talk about limitations on subcontracting, who to send information to on site; and then talk about protest.

Chris Ishan:

Now Slide 35

Esmeralda Sanchez:

Thanks Valerie. Yeah so, the limitations on subcontracting. The limitations on subcontracting are typically not five issues, however when it comes to verifying the performance of work on a JV, SBA does ensure that the requirements are being met. Limitations on

subcontracting according to the FAR are listed as services that the JV must perform 50% of the value of their contract with its own personnel; supplies - 30% of the cost of manufacturing, excluding the materials; and in contracts regarding general construction they would need to perform 50% of the cost of the contract with their own employees, excluding material. In special trade construction, 25% of the cost of the contract would need to be done with the JV's own employees, excluding material. Well actually since the JV is not populated, they would have to be done by the JV partners.

However, many of you do know that the DOD has issued a DOD Deviation and so for some procurements, for DOD procurements SBA does supply the DOD Deviation requirements essentially which limit the subcontracting amounts to 50% to subcontractors that are not similarly situated entities. That would be for services and also for supplies. So, the JV or the prime contractor would not pay more than 50% of the amount to entities that are not similarly situated, excluding the cost of materials. However not all civilian agencies use the limitations on subcontracting identified on the DOD Deviation, and so until that change is made in the FAR, SBA will continue to treat them a bit differently as it regards size discriminations.

Next slide.

SBA has six area offices to which protests should be forwarded. It really depends on the area office that services the entity that is being protested. So, the area in which the headquarters of the company is located would be receiving the size protest referral.

Next slide.

Chris Ishan:

Slide 37

Esmeralda Sanchez:

So, SBA has 15 business days to issue a formal determination. Typically, we do take 15 business days, sometimes we do request extensions, and a contracting officer shall not make awards for at least 15 business days unless the contracting officer determines that an award must be made to protect the public interest.

After 15 business days if the SBA has not completed the site determination the contracting officer can award the contract; however, the contracting officer must determine in writing that an immediate need to award the contract has been found. There has to be a finding that a immediate need to award a contract and that waiting would be disadvantageous to the government.

Next slide.

SBA does not perform advisory opinions and so size protests cannot be used to vet potential awardees. Protests are always in connection with a procurement, a particular procurement or IE the impending procurement. There is no database that SBA maintains that lists all the small businesses that are certified with SBA. SBA uses SAM just like the civilian and DOD agencies; however, after ...other than small business finding we do inform the concerned that their status as a small business needs to be updated on SAM.

Premature protests are those that are received before the notification of the apparent successful offer. Those premature protests are dismissed even if they're made by the contracting officer, and SBA does ask that if there is a GAO protest that you let the area office know.

Next slide.

Chris Ishan:

Slide 39

Esmeralda Sanchez:

Thanks. Timeliness and specificity. The contracting officer must receive a protest within five business days, five business days after the notification of the apparent successful offer. The date of debriefing is not relevant. The five-day period begins when the apparent successful offer is identified.

A protest must be specific, must contain detailed evidence to support the allegation that the concern is not small.

The protestor must have standing to the protest or the protest will be dismissed. In other words, must be an interested party.

Next slide.

Chris Ishan:

Slide 40

Esmeralda Sanchez:

If SBA finds that a protest is timely and specific SBA will begin the size determination process and will notify all interested parties of a pending size determination. As I mentioned SBA has 15 business days, or working days, to issue a decision, assuming there's no extension, although in our area we are finding that most size determinations are being given extensions because of their sheer number of size protests coming in.

The final copy of the size determination is ultimately sent by SBA to the protestor, the protest concern, and the contracting officer.

Next.

Chris Ishan:

Now Slide 41

- Male Speaker:** So that ends the joint venture and the size section, and Chris I think I jumped in too quick because you were getting ready to see if we have any questions that have come in.
- Chris Ishan:** I've got some questions for you guys if you're ready.
- Esmeralda Sanchez:** Sure thing.
- Chris Ishan:** Okay. So, the first one takes us back to Slide 16, got that one up there. Slide 16 states that a joint venture is reviewed by a contracting officer, not the SBA. What are the review criteria?
- Valerie Coleman:** So, the review criteria is what we were just talking about on the parts of the joint venture. Go through the joint venture and make sure that it's a fully complete joint venture, that these provisions are in there and that it is totally complete. You can get a template of a joint venture on the SBA website if you want to keep one of those in-house so any time you get a joint venture you can go through it to make sure that what you're looking at and what is in the template match up.
- Esmeralda Sanchez:** And if I can add also that the JV agreement has been altered to fit the procurement that is being sought out. You want to make sure that it's not that the JV is too general so that it doesn't meet the requirements under the [00:47:53 inaudible].
- Chris Ishan:** And I believe you have answered this one but it was just before the examples: If a joint-venture combined employee account exceeds the employee sized very small business in a specific NAICS Code does that cause the joint venture to be ineligible for a small business set aside?
- Esmeralda Sanchez:** Yes. Yes, it would be other than small. The joint venture you're saying, correct?
- Chris Ishan:** Yes.
- Esmeralda Sanchez:** Yes, the joint venture would be other than small, unless they're eligible for an exception to affiliation based on those two exceptions. If both JVs are small, they may be eligible for Exception Number One, and Exception Number Two would be that a mentor-protégé relationship be in place and that the protégé be small and that the mentor-protégé agreement and the JV meet certain requirements.
- Chris Ishan:** Okay. This individual has two questions. Can you expand on the populated and unpopulated? I'm trying to think what slide that was from. You recall what they would be referring to?

Esmeralda Sanchez: SBA at one point allowed joint ventures to be populated, to have their own employees. Now they're unpopulated, they're not allowed to have their own employees. It's basically done so that the government can make sure if the performance of work requirements are being met. So, it basically means that a joint venture cannot have its own employees.

Chris Ishan: Okay. The second part is, as well as formal and informal joint venture.

Esmeralda Sanchez: Informal joint ventures could be those joint ventures or partnerships in which a prime contractor might be using a sub contractor for certain work on procurement and so SBA might deem them to be joint ventures. So even though they have no joint venture agreement perhaps their proposal is such that it raises questions as to whether they're a joint venture.

Chris Ishan: Val I think you touched on this one, but can you provide an example of how to figure the 40% requirement of a joint venture on a 15% subcontracting limit general construction contract?

Valerie Coleman: So, based on the current regulations that are in the FAR right now, it would be the same thing. Remember the one thing I said was that a joint venture is under the same obligation to perform work and to do the same things that an individual small business would do. So, if it's a small business joint venture what we're saying is, since Chris mentioned the 15%, a small business in general construction would have to do right now if you weren't using the deviation, 15% of the labor incurred to do the work with their own force.

So, in this case it would be 15% of the work would have to be done by... we would want 15% of the work to be done by the joint venture itself which means two parties to it. However, since the small business is involved, we want the small business to do 40% of the 15, and that can't be anything like it's just administrative or something like that. It has to be substantial.

Chris Ishan: Great. Next question is how long should it take for SBA to review an Eight A joint venture agreement?

Valerie Coleman: Well it has to go through the district office because everything on Eight A is handled in a district office. So, it goes through that and then it has to go I believe, I have not been in the Eight A program for 18 years, so it depends on how it's going to take the district to do it. They need to do it and get it up to Washington.

I would say to be on the safe side, if I look at that like I do the All-Small Mentor-protégé Program right now, which we were told last

week is basically taking 90 days, you always want to tell a business longer than shorter, just in case. So, I would say that you would need to allow it at least 60 to 90 days for that joint venture to be approved.

Chris Ishan: Okay. This is follow on basically to that question too: Does the SBA review the joint venture agreement before the two entities are allowed to be approved for a mentor-protégé?

Valerie Coleman: Two entirely separate things. So, we review the mentor-protégé agreement and approve that. The joint venture agreement we do no, we cannot look at that, that's why we provide a template to help both parties to the joint venture to make sure that the provisions that I mentioned and also the specific information that Esmeralda mentioned are in that joint venture when it's presented to the procuring activity.

Chris Ishan: When you say the "joint venture partners" does this mean that the payroll submitted must be employees of the new joint venture entity instead of the small businesses that make up the partnership?

Esmeralda Sanchez: No, it would be for the small businesses that make up the partnership, the JV.

Valerie Coleman: You know Esmeralda said that we do not do populated joint ventures so there would be no employees of the joint venture, it would be employees of each partner to the joint venture.

Chris Ishan: Correct. Okay next question: Are there any other exclusions other than cost of materials that could be not considered for the limitations on subcontracting?

Esmeralda Sanchez: The way it currently reads it's the labor incurred to do the work, however under the new provisions which talks about similar situated entities, I believe it's on the total cost of the contract, and so depending on how your individual activity looked at it, if there's a deviation in what they put in to it, but if you look at 52 219 14 at it reads now, it is for the labor incurred to do the work.

Chris Ishan: So, this question is related to joint ventures being awarded under the basic order agreement: Does the award of the BOA itself count as a contract against the three contracts that may be awarded to the joint venture in its lifetime?

Valerie Coleman: I'm going to say that we need to get a legal opinion on that Chris, and to see whether legally we're talking about a BOA being one award or are we talking about the individual awards under the BOA

being contracts. So, if you can send us that we can get an attorney to look at that and give us a legal opinion.

Chris Ishan: Okay. So, does a joint venture have to include a small business or can it be two other than small businesses?

Esmeralda Sanchez: Well for a small business procurement, yes, they would have to be small otherwise, they could but they would not be allowed to get a size contract, small businesses.

Chris Ishan: Get it. So, this next one is in regards to past performance. How is past performance evaluation completed on a joint venture?

Esmeralda Sanchez: That is reviewed by the contracting officer. We don't typically review that unless it's part of ... actually we don't review past performance.

Chris Ishan: The question I think they're trying to get at is are you looking at the joint venture as a whole... are they able to look at the joint venture as a whole or do they look at the two separate contractors and their previous past performance?

Valerie Coleman: I think that the way the ruling reads now is that they can look at the individual past performance of each party to the joint venture, but let me double check that.

Chris Ishan: Okay.

Valerie Coleman: We do have an open FAR case right now given the joint ventures because there really hasn't been that much written, and so that may be part of the open FAR case right now.

Chris Ishan: Right. Okay. On to Slide 23. Each joint venture may be awarded up to three contracts, is there a limit on how many joint ventures a member of the individual businesses may include?

Esmeralda Sanchez: SBA does not have any regulation that really limit the number of contracts or the number of JVs that can receive less than three contracts...three or less in two years; however SBA may look at the history of the two entities and it may make a finding that the JV partners are generally affiliated based on their continued history and their having a long-standing relationship.

Chris Ishan: Okay the next question is for an unpopulated joint venture are the joint venture managing partners the subcontractors of the joint venture? How is the prime and sub relationship defined for an unpopulated joint venture?

Valerie Coleman: In a joint venture the parties are not prime and sub to each other. See a lot a people get the word "teaming relationships" mixed up.

There's only two types of teaming relationships, there's a prime sub and then there is a joint venture. So, the two parties to the joint ventures are not sub-contractors of each other. Am I understanding the question correctly?

Chris Ishan: Well the definition is mainly it goes back to the unpopulated joint venture, the definition of that. So, I think you are.

Valerie Coleman: Yeah because the unpopulated, it's each employee of each company stage their own employ so each company will be doing their own work. So yeah, in that case that would not be a prime subcontractor relationship.

Chris Ishan: So, got another one on past performance. Specifically, who gets the credit when joint-venture members decide to propose separately on a procurement?

Valerie Coleman: So, they were previous joint-venture partners, or they had a joint venture and now they're each going their own separate ways and they're going to it individually.

Chris Ishan: That's how I understand it. Yes.

Valerie Coleman: Again that would be, as I said before, on the past-performance issue, I don't know if the correct language would be, or the correct answer would be we'll look at what each partner to the joint venture did as far as what they did in that solicitation or to that contract to determine past performance. That's part of I think a subset of the question that I'm going to have to get Legal to answer.

Chris Ishan: Okay. Got a couple more for you. So, can SBA override a joint venture pending award?

Esmeralda Sanchez: Override meaning re-writing the joint venture? For size determination purposes we determine whether the JV meets the requirements or not. We don't rewrite, we don't over-write...override, sorry. I'm not too sure I'm understanding.

Valerie Coleman: Are they asking if they submit a joint venture can the SBA say no it's not correct, and as Esmeralda just said, if the federal agency if they're the apparent awardee and for some reason the federal agency thinks there's affiliation or there's something else going on, of course they would send it in for a size determination. In that case, as Esmeralda said, a size specialist determine that it really was affiliated and it's not a small business joint venture, then we would say that is incorrect that they couldn't bid because they're not small.

Chris Ishan: Okay.

Valerie Coleman: I'm thinking that's what they're asking. I think that's what the basis of the question was.

Chris Ishan: Got it

Esmeralda Sanchez: Thanks Val.

Chris Ishan: Well here's one that just came in. Does the contracting officer have privity with the joint-venture members?

Valerie Coleman: Privity with the joint-venture members? In what way?

Chris Ishan: I don't know

Valerie Coleman: Whoever wrote that question, could they expand on that?

Chris Ishan: Sure. And then here's the last one. If they're still on they could write in the comment, the chat box to expand on that. We've got one example here, one more question that came in: So, has there been any lessons learned JO case law, anything worth sharing concerning examples of the evaluation criteria or factors where the government overreached concerning joint ventures? For example, if corporate experience is an evaluation factor then must government accept the joint ventures experience as acceptable if only Partner One has it but Partner Two does not? That would mean that 50% of the work was performed by the joint venture by at least one of the partners. I think that goes exactly with a previous one. So, would you agree?

Valerie Coleman: That was a little in-depth right?

Chris Ishan: Yes, it was.

Valerie Coleman: Any of the questions that we're not able to answer we'd be more than happy if you'd put them in writing. Esmeralda, do you want to respond?

Esmeralda Sanchez: I was just going to say I don't know any case law off hand, however I could do some research and get back to you.

Kyle: Okay. Well we are over time, so I just want to thank everyone. I want to thank Esmeralda and Val for their great presentation today and responding to the large number of questions that we did have. As Val said, if you do have any questions after please feel free to reach out to them directly, and I want to thank everyone for being on today's call and we look forward to your participation in the months to come.

Male Speaker: That concludes our conference. Thank you for using AT and T Event Conferencing Enhanced. You may now disconnect.

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