BASS BERRY SIMS PLC

Maximizing Joint Venture Opportunities with SBA 8(a) and Other Small Business Concerns

8(a) Introduction

- <u>Basics</u>
  - In March 2011 new rules took effect for SBA's 8(a) small disadvantaged businesses, mentor-protégé program, and joint venture agreements
  - First full revision to SBA's 8(a) program in more than a decade
- <u>Benefits</u>
  - Expands federal contracting opportunities for businesses of all sizes
  - Eases certain regulations SBA deemed too restrictive
- <u>Risks</u>
  - Introduces new restrictions on participating businesses
  - Tightens rules SBA determined were too expansive or indefinite

8(a) Overview

- Basics
  - Small businesses 51%+ owned and controlled by socially and economically disadvantaged individuals are eligible
  - Rebuttable presumption that Black, Hispanic, Asian, and Native Americans are socially disadvantaged
  - Can qualify if owned by an Indian tribe, Alaska Native Corp (ANC), Native Hawaiian Org (NHO), or Community Development Corp (CDC)
  - Firms must apply to the SBA for admission into the 8(a) program and may stay in the program for up to 9 years if admitted
- Benefits
  - Can receive 8(a) set-asides and sole source contracts and business development assistance from SBA
  - 8(a) firms can form joint ventures and bid on contracts with non-8(a) firms and may receive additional assistance under SBA's mentor-protégé program

8(a) Mentor-Protégé Program

Basics

- Approved mentors that assist 8(a) firms gain access to 8(a) and small business set-asides
- Mentor/Protégé enter into formal agreements to outline roles of each party

SBA 8(a) MP Program Restrictions Eased

- A protégé may now have a second mentor if it's in an unrelated secondary line of business in which its first mentor lacks expertise
- A JV between a mentor and protégé can seek federal subcontracts as a small business as SBA has expanded the exemption from affiliation beyond federal prime contracts
- Non-profits are eligible as mentors

Restrictions on SBA 8(a) MP Program

- 3 protégé per mentor limit to prevent collecting protégés to get 8(a) contracts
- No approval of mentor/protégé agreement if 8(a) has less than 6 months left as 8(a)
- 8(a) firm can't be a mentor and protégé at the same time
- Mentor's assistance must be tied to the protégé firm's SBA-approved business plan
- Consequences for a mentor who fails to assist its protégé, include stop-work orders, exclusion from mentor-protégé program, or debarment (no intent to assist protégé)
- Clarified that federal agencies must have statutory authorization or SBA approval to administer a mentor-protégé program that exempts partnering firms from SBA's affiliation rules (e.g., DOD)

8(a) Joint Ventures

- Parties under a SBA 8(a) Mentor Protégé agreement can form an SBA-approved JV between an 8(a) firm and a non-8(a) to help 8(a) firm increase its capacity to perform and provide non-8(a) firms access to 8(a) and other small business set aside contracts
- A JV can receive 3 federal contract awards in a 2-year period and may continue to bid on others until it receives its third award
  - Old rules limited JV to submitting no more than 3 offers over a 2-year period
- Parties to a JV can form additional JVs with SBA approval, each of which can receive 3 awards (SBA cautions this may lead to affiliation at some point)
- 8(a) firm must do 40% of the work for each 8(a) contract awarded to the JV and get profits equal to the work the 8(a) performs
  - Under old rules 8(a) had to perform a "significant portion" of JV's work and get 51% of the profits
  - Under current rules 8(a) might get less than 51% of the profits (e.g. if it does only 40% of the work)
  - Current rules differ if JV is populated with employees (*e.g.* 8(a) must substantially benefit from JV's work, JV may not subcontract any work to a non-8(a) JV partner or to any of non-8(a)'s affiliates)

Lessons Learned from *Size Appeal of Kisan-Pike*

- General rule for affiliation exception = JV agreement must be approved by SBA for 8(a) procurement, but for other set-aside contracts, SBA approval not required (just approved 8(a) MP Agreement)
- However, if a protest is filed challenging size status of JV, the JV agreement will be reviewed to determine if it meets requirements of 13 CFR 124.513(c) & (d)
- *Kisan-Pike* involved USACE small business set-aside for award of design-build contract
  - Kisan (protégé) and Pike (mentor) had an SBA approved 8(a) MP Agreement
  - Kisan-Pike JV self-certified as small for the procurement and won contract
  - Contracting Officer initiated size protest due to concerns with JV Agreement

Lessons Learned from *Size Appeal of Kisan-Pike*

- OHA found that despite the approved MP Agreement, JV Agreement still must meet the requirements of SBA regulations in order for affiliation exception to apply
- Specifically, following statements were not enough:
  - "Kisan and Pike will provide equipment, facilities and other resources to the JV required to execute the contract"
  - Kisan "will perform, at a minimum, 40% of the JV's work"
- OHA found that these types of broad statements do not meet the specificity required by SBA regulations, and the fact that the JV was for a design-build contract and detailed information may not be available at time of proposal submission was not an excuse (and the regulations did not provide an exception)

Proposed Rule to Expand Opportunities

- February 6, 2015 SBA issued Proposed Rule to expand mentor-protégé program to all small business contractors and SBA programs
  - Implements provisions of Small Business Jobs Act of 2010 and NDAA of 2013
  - Creates new mentor-protégé program to encompass all non-8(a) programs (HUBZone, WOSBs, and SDVOSBs)
  - Proposed Rule also would make changes to current 8(a) mentor-protégé program, clarify meaning of a joint venture, and implement new compliance requirements to approved JVs
  - Proposed Rule also prohibits any non-SBA federal department or agency, excluding the Department of Defense, from conducting their own independent mentor-protégé program without receiving approval from SBA

Proposed Small Business MP Program

- Key Requirements/Changes:
  - Mentors = "for-profit business concern of any size"
    - Would alter 8(a) regulations that currently permit nonprofit mentors
    - Mentors permitted to have no more than three protégés between 8(a) and Small Business MP programs
  - Firms can be mentor or protégé, but not both at the same time
  - Protégés
    - Eliminate requirement for both programs that protégé have a size less than half the size standard corresponding to its primary NAICS
    - But, firms must be "verified" by SBA as a small business before the firm can act as a protégé
      - Affirmative determination may be made by either independent request to SBA or come as part of a size determination
  - All MP Agreements must be in writing, SBA approved, subject to annual review, and have a 3 year limitation on duration

Expansion of Affiliation Exception

- Under current regulations, an SBA-approved JV agreement between a mentor and an 8(a) protégé qualifies as small for both 8(a) and non-8(a) contracts as long as the protégé qualifies as small for the procurement.
- Proposed Rule would apply the same affiliation exception to the Small Business MP Program. Thus, as long as the protégé qualifies as small for the procurement at issue, a JV between a protégé and its SBA-approved mentor in the Small Business MP Program would be deemed to be a small business for any contract or subcontract under that procurement.
- However, this would not mean that a JV would qualify for every set-aside program. For example, a JV between a HUBZone protégé and its approved mentor would not automatically qualify for a WOSB set-aside contract, unless the protégé also met the WOSB eligibility requirements

Impact of Proposed Rule on JVs

- Proposed Rule continues to require that all JVs must be created through a written document. However, a JV need not be formed as a LLC or other formal legal entity.
  - SBA considers informal JVs to be a partnership, whether or not established as a formal partnership. Proposed Rule clarifies that an "informal joint venture" is only informal in that it does not need to be formed as a separate legal entity, but the requirement for a written JV agreement remains
- "Populated" JVs
  - Current SBA regulations allow a JV formed as a separate legal entity, e.g., an LLC, to populate the JV with individuals intended to perform on the JV's awarded contracts
  - The Proposed Rule would eliminates that possibility. Under the Proposed Rule, a JV must either be unpopulated, or populated with employees to perform only administrative functions. This change was implemented so SBA could more easily identify the percentage of work performed by the protégé member of the JV
- HUBZone JVs
  - Currently, the HUBZone program only authorizes JVs between two or more HUBZone qualified small business concerns
  - Proposed Rule would expand the program allowing large businesses and non-HUBZone small businesses to act as mentors and enter into JV agreements with HUBZone protégés

Impact of Proposed Rule on JVs

- New Compliance Requirements
  - Certification requirement
    - Prior to performance of a contract, *i.e.*, a SDVOSB, HUBZone, WOSB, or small business set-aside, all partners in a joint venture agreement must certify to the contracting officer and SBA that they will carry out the contract in compliance with the JV regulations and with the JV agreement
  - Reporting requirements
    - Adds reporting requirements that each party to the JV must submit to the contracting officer and SBA
    - For example, the JV must submit an annual report explaining how the performance of work requirements are being met
    - According to the Proposed Rule, the government may consider a contractor's failure to comply with JV regulations or submit the required certifications and reports to be a ground for suspension and debarment
  - Methods to track JV awards
    - Proposed Rule posits that regulations ensuring that both the government and the public can track JV awards will promote transparency and accountability, deter fraudulent or improper conduct, and promote compliance with SBA regulations. The SBA is currently debating different methods to track awards made to joint ventures and sought comments on how to best accomplish this task

Questions?

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