

DYNAMIC DUOS:

JOINT VENTURES



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ICBSShow: Diversity in Government Contracting

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## Member



This presentation is not intended to be legal advice. If you have specific questions, please contact a government contracts attorney.



Legal updates for government contractors.



# GovConBrief

# DISCUSSION SUMMARY



- Joint ventures
  - What is a joint venture?
  - Why are joint ventures helpful?
  - Drawbacks and pitfalls
  - Difference from prime/ sub teams
  - Work share requirements
  - Joint venture agreements
  - When is approval required?
- Mentor-protégé joint ventures
  - MP Overview
  - Duration, limitations, eligibility
  - Mentor-protégé JV agreements



# JOINT VENTURE RELATIONSHIPS

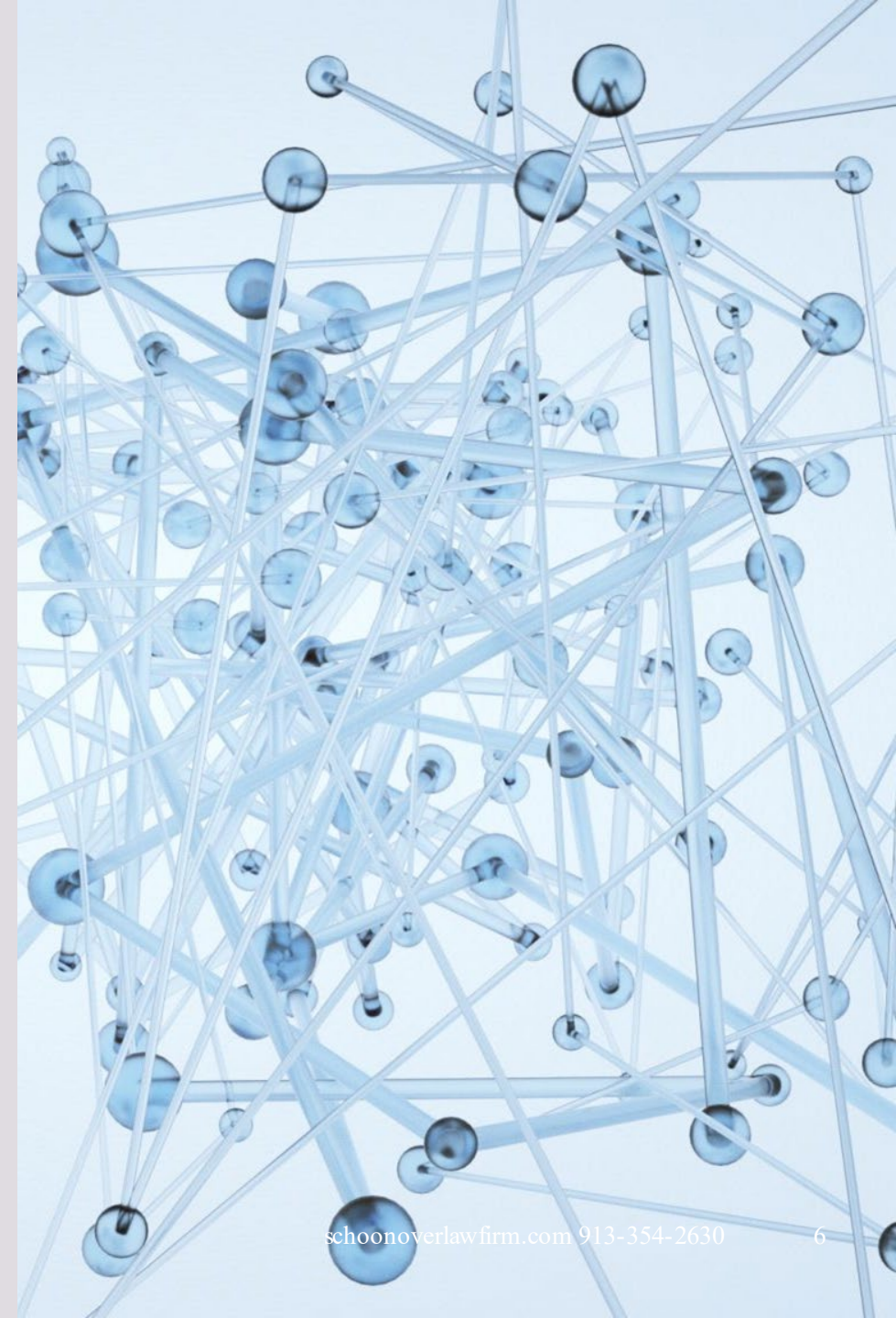


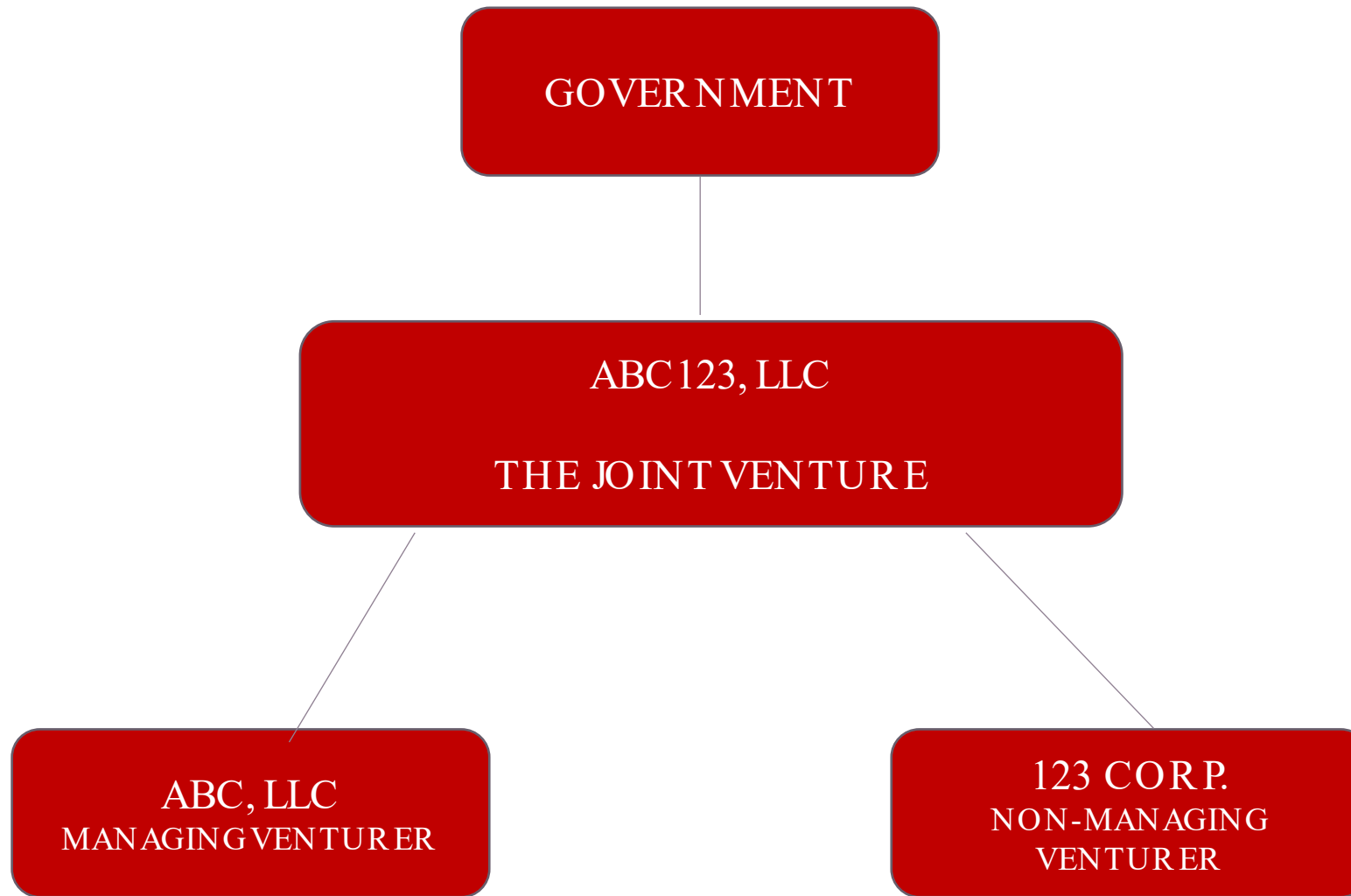


# WHAT IS A JOINT VENTURE?



- According to the SBA, a joint venture is a separate legal entity of limited purpose and duration.
- Let's break that down...
- “Separate legal entity”
  - The joint venture is an independent businesses (e.g., corporation, LLC, LLP, etc.)
  - The founding businesses are members/ owners
- Limited purpose
  - Pursue specific federal contracting opportunities
- Limited duration
  - They are not ongoing concerns
  - Spoiler Alert: The SBA's rules on duration are very strict





# WHAT'S THE POINT?



- In a word: collaboration.
- Joint ventures allow two small businesses to work together to pursue federal jobs that otherwise would have been out of reach.
- Practical support
  - The joint venture structure allows businesses to:
    - Pool resources
    - Diversify offerings
    - Take on larger projects
    - Avoid possible affiliation
    - Leverage security clearances
    - Share past performance



- Preserve small business status
  - Compliant joint ventures receive an exception from affiliation
  - Exception only lasts two years
  - “Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award.” 13 C.F.R. § 121.103(h).
  - Submitting a proposal more than 2 years after first contract award will result in affiliation of the joint venture members
  - Solution: Create a new joint venture.
- Legal mechanism for “co-prime” contractors
  - Joint ventures are a way for multiple companies to work at the prime contractor tier.

## WHY ARE JOINT VENTURES HELPFUL?



- Past performance
  - SBA's regulations require the agency to consider the past performance of the JV and its constituent members as part of the evaluation
  - Small business can now also rely on its performance as a JV member, to some extent
- Equipment, personnel and facilities
  - Ventures can pursue larger work as a duo with shared resources and experience
- Facility clearances
  - SBA regulations allow either the joint venture's clearance, or individual member clearances to satisfy security clearance requirements.

GREATER THAN THE  
SUM OF ITS PARTS



# DRAWBACKS AND PITFALLS

- Timing
  - Don't wait! Lots of Paperwork
  - EIN/TIN, DUNS, and SAM registration – before bidding
  - In some instances, joint venture agreement must be approved to bid
  - Non-compliant joint venture agreement
  - SBA's regulations have detailed requirements
  - If joint venture agreement doesn't comply, it does not get the benefit of the affiliation/ size exception
- Performance requirements

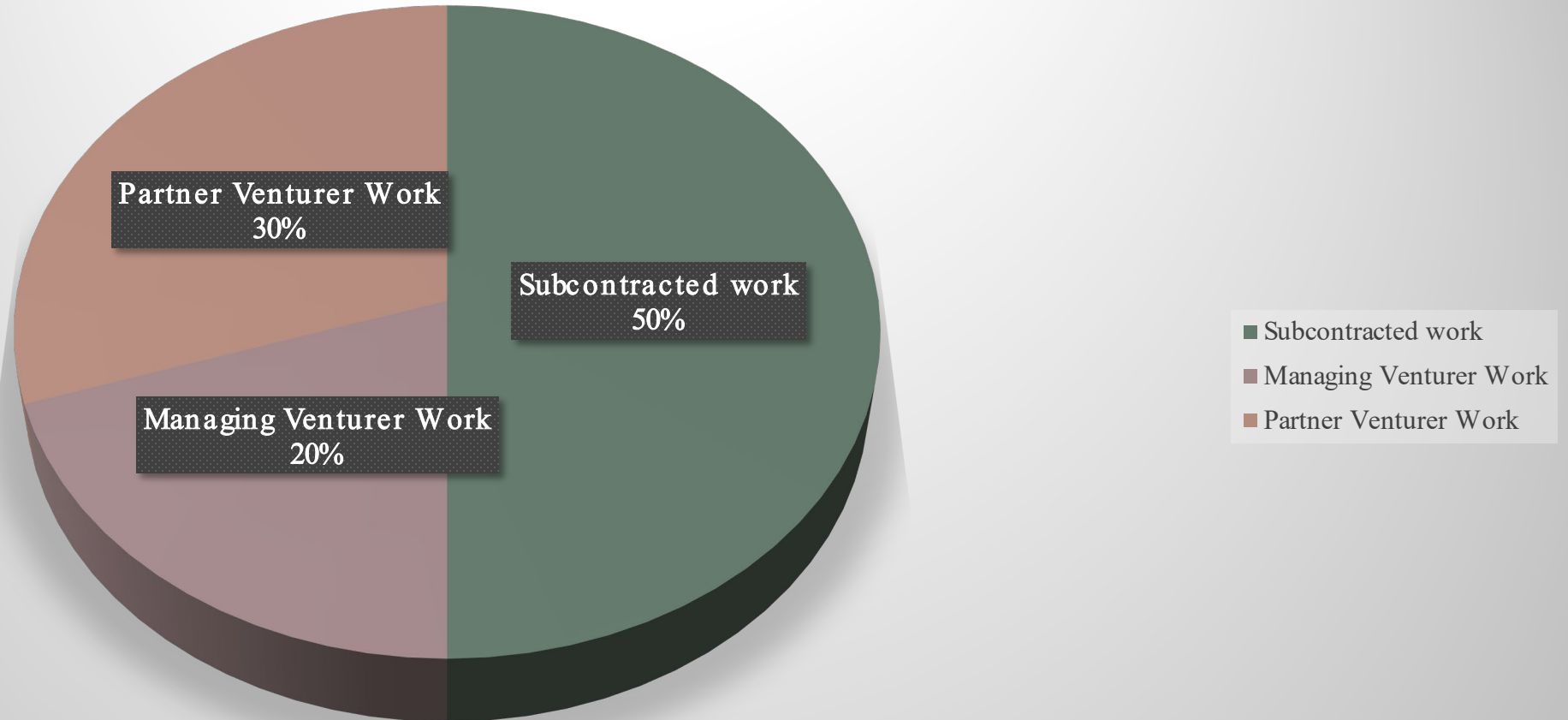
# PERFORMANCE REQUIREMENTS



- **Limitation on subcontracting**
  - Applies to virtually all small business set-aside contracts
  - Limits the amount of a project that may be subcontracted
    - Measured as percentage of total dollars paid by the government
    - Different limits for different industries
- **Performance work requirement**
  - Applies only to small business joint ventures
  - The managing venturer must perform at least 40% of the work performed by the joint venture

# HOW DO THESE REQUIREMENTS INTERACT?

Total Project



# JOINT VENTURE AGREEMENTS



- All joint ventures must have a written agreement
  - Must comply with applicable regulations
  - Have JVA in place before bid is submitted
- JV agreements must contain contract-specific provisions
  - Create addendum for each contract the JV will bid on



# “UNIVERSAL” JOINT VENTURE AGREEMENT REQUIREMENTS

- Purpose – what is the joint venture designed to do?
- Bank account – requiring the signature or consent of all parties for payments to venturers for work performed
- Itemized list with value of major equipment, facilities, and resources
- Responsibilities of the parties
  - Negotiation of the contract
  - Source of labor
  - Contract performance – including how they will meet the performance of work requirements
- Obligating all members to perform

# “UNIVERSAL” JOINT VENTURE AGREEMENT REQUIREMENTS

- 8(a)/ SDVOSB/ WOSB/ HUBZone/ protégé must own 51%
- 8(a)/ SDVOSB/ WOSB/ HUBZone/ protégé = managing venturer
  - Responsible for the day-to-day management and administration
  - Partners may participate in decisions “as is commercially customary”
- Employee of the 8(a)/ SDVOSB/ WOSB/ HUBZone/ protégé = Responsible Manager
  - Has the “ultimate responsibility for performance of the contract”
  - Need not be a current employee when offer submitted if letter of intent
  - Cannot be an employee of the mentor
- 8(a)/ SDVOSB/ WOSB/ HUBZone/ protégé must perform at least 40% of the joint venture’s workshare
- 8(a)/ SDVOSB/ WOSB/ HUBZone/ protégé must receive profits commensurate with work performed OR a higher percentage agreed to by the parties

# DIFFERING JOINT VENTURE AGREEMENT REQUIREMENTS

## 8(a)/ HUBZone/ WOSB/ SDVOSB

- Records
  - Accounting and administrative records kept at the MV office
  - Final original records retained by the MV
  - Quarterly financial statements submitted to SBA within 45 days of end of each operating quarter
  - Project-end profit and loss statement submitted to SBA within 90 days of contract completion

## MP JV

- Records
  - Accounting and administrative records kept at the MV office
  - Final original records retained by the MV
  - Annual performance-of-work statement submitted to SBA and the contracting officer within 45 days of each operating year
  - Project-end performance-of-work statement submitted to SBA and the contracting officer within 90 days of contract completion

# Differing Requirements: Records



- **MP JV:**
  - Annual Performance of Work Statements to SBA and CO 45 days after each operating year
  - Project end profit and loss statement to SBA within 90 days
- **8(a):**
  - Annual review—explain how performance work requirements being met
  - Completion of contract—report to SBA how performance work requirements met
- **HUBZone:**
  - Annually submit limitation on subcontracting report to SBA
  - At completion of contract submit limitation on subcontracting report to SBA and CO
- **SDVO SB/ WO SB:**
  - Annual report on performance of work requirements to SBA and CO
  - At completion of contract submit report to SBA and CO on performance work requirements

# Differing Requirements: Certifications



## MP/ WOSB to CO and SBA:

- JVA complies
- Parties will perform pursuant to workshare requirements

## 8(a) to CO and SBA:

- JVA complies
- Parties will perform pursuant to JVA and workshare requirements
- **SOLE SOURCE:** Parties have obtained SBA's approval of JVA, addendums, and no changes not approved

## HUBZone to CO:

- At offer
  - MV is HUBZone
  - MV is small
  - MV will "attempt to maintain" 35% employee residency
  - JV will comply with limitation on subcontracting
- At award
  - JVA complies
  - Parties will perform according to JVA

## SDVO SB

- At offer
  - MV is certified
  - It is a small business
  - It will comply with the limitations on subcontracting
- Prior to identification as apparent successful offeror.
  - Parties have a compliant JVA
  - The parties will perform in compliance with the JVA and the limitations on subcontracting



# When is Approval Required?

8(a) JVs up for sole source awards must be approved **prior** to award

- 8(a) must “lack the necessary capacity to perform”
- Agreement must be “fair and equitable” and of “substantial benefit” to 8(a)
- **Denial** if the 8(a) brings little to the table other than 8(a) status
- Amendments must be approved also

Approval no longer required for competitive awards  
BUT eligibility will be determined at the time of award





# Costly Errors

- *Beshenich Muir & Associates, LLC et al.*, SBA No. VSBC-292-P (July 19, 2023)
  - OHA found Joint Venture did not qualify as SDVO SB because the agreement did not identify a Responsible Manager, and did not provide sufficient detail regarding equipment, facilities, and other recourses, or adequately specify negotiation, source of labor, or performance responsibilities.
- *New Directions Technologies, Inc.*, SBA No. VSBC-299-P (Aug. 9, 2023).
  - OHA concluded SDVO SB Joint Venture was non-compliant because day to day operational control was not vested unconditionally in the managing venturer.
- *Focus Revision Partners*, SBA No. SIZ-6188 (Jan. 31, 2023).
  - Mentor-protégé Joint Venture was ineligible for award because the addendum for the project was unsigned and submitted to the government after the deadline for proposal submission.

# Take Home

- Size and status protests of joint ventures are increasing in frequency and finding success.
- Joint Venture Agreements are not mere “paper” for a file.
  - The SBA will review the substance of a Joint Venture Agreement during a protest
- Joint Venture Agreements need to be compliant *before* proposal submission.
  - All 12 “magic” requirements must be present with sufficient detail for *each* contract.
  - If using an addendum, it needs to be executed before proposal submission and list all required information.

MENTOR -  
PROTÉGÉ  
JOINT VENTURES



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# Mentor-Protégé Program

- Overview
  - Mentor-Protégé Program is a way for one business (large or small) to provide small business developmental assistance
  - Improve the protégé's ability to compete for federal government contracts
  - Open to all small businesses
- Administration
  - 8(a) MPP “rolled into” ASMPP to become MPP
  - The SBA administers the Mentor-Protégé Program
- Application
  - Applicants must develop a mentor-protégé agreement and submit it to the SBA for approval.
    - Agreement details developmental assistance items



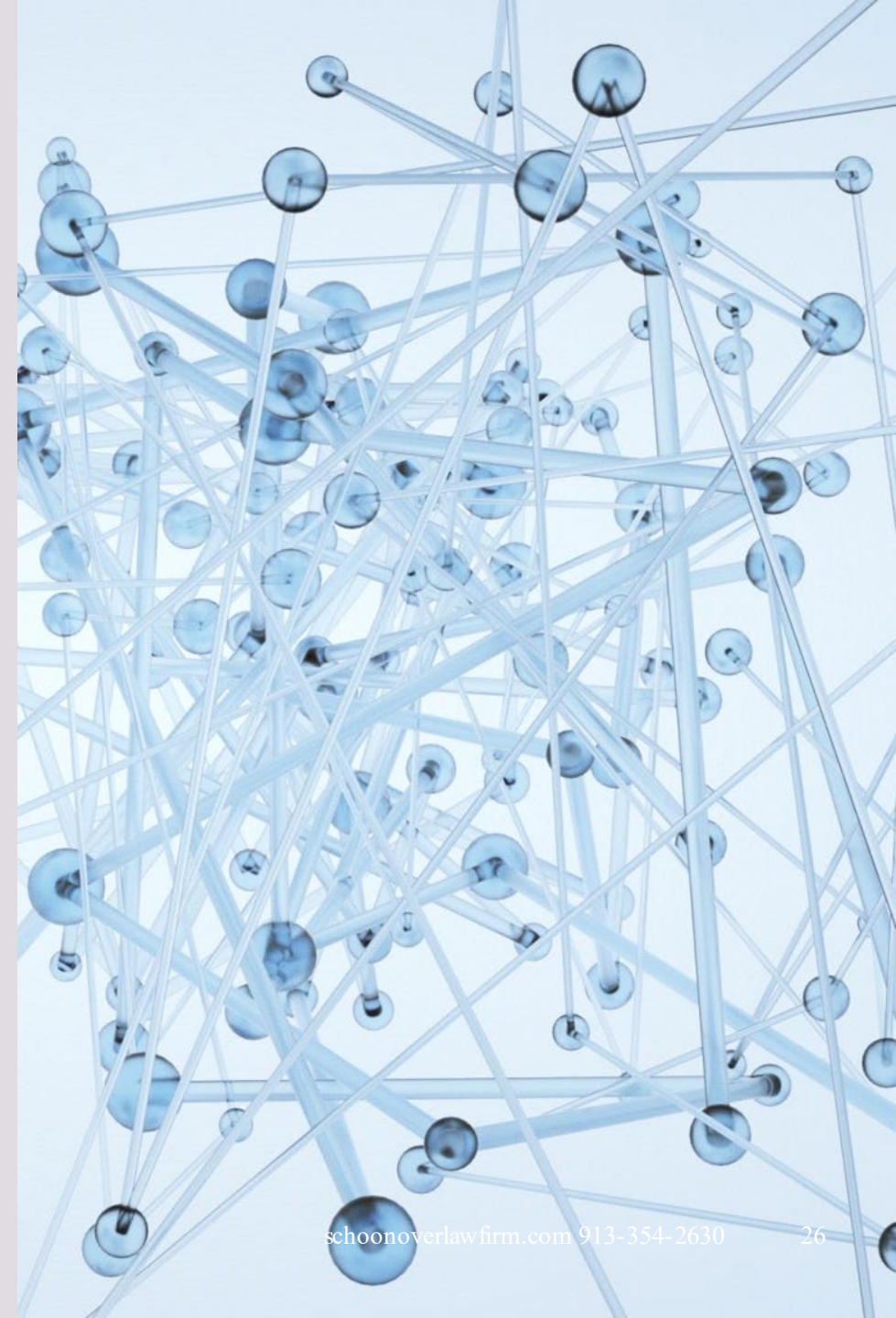
# MENTOR-PROTÉGÉ JOINT VENTURES

- Mentor-protégé relationship does not establish an automatic joint venture
- Mentor-protégé joint venture must still abide by:
  - Joint venture work share requirements
  - Applicable limitation on subcontracting
- Mentor-protégé joint venture agreements must include the same provisions as the “universal” joint venture agreements
- SBA must approve the mentor-protégé agreement before the joint venture can submit an offer for a federal government contract
  - Otherwise, SBA may find the venturers affiliated

# IMPORTANT CONSIDERATIONS



- Protégé
  - This is a great opportunity to learn from a seasoned company
  - Ensure compatibility
    - Limited to two mentors in a lifetime
    - Might try subcontracting with the company before beginning the mentor-protégé relationship
- Mentors
  - Opportunity to assess its own abilities and areas for improvement
  - Chance to make investments in younger companies
- Don't treat the relationship merely as an avenue for joint venturing





## TAKEAWAYS



- Joint ventures are a powerful tool
  - Allow two small businesses, or a mentor and its protégé to collaborate to target larger projects.
  - Provide affiliation exceptions and limitation on subcontracting compliance advantages
  - Must have compliant JVA in place at time bid is submitted!
  - Provides alternative to subcontracting
    - Because they are separate legal entities, joint ventures have limitation on subcontracting advantages
  - Only joint ventures receiving an 8(a) sole source contract need be pre-approved by the SBA
- Mentor-protégé program offer significant benefits including affiliation protection and joint venturing possibilities

Thank you!

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