

SUBCONTRACTING &
TEAMING INSIGHTS
FOR FEDERAL
CONTRACTS



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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.



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DISCUSSION SUMMARY



Teaming

- Prime/ Sub Teams
- Limitation on Subcontracting Compliance
- Key FAR Flow-Down Provisions

Mentor Protégé Programs

- DoD MPP
- SBA MPP



PRIME/ SUB
TEAMS



TEAMING

- Prime Contractor/ Subcontractor
 - Only prime in “privity” with the Government
 - No new legal entity created
 - Subcontractor paid on a pre-determined basis

- Joint Ventures
 - New legal entity (split ownership)
 - Only joint venture entity in “privity” with the Government
 - Venturers split profits and losses
 - Workshare requirements for venturers

PRIME/ SUB TEAMS



- Quintessential contracting relationship
 - Prime is awarded the contract, then subcontracts out a portion of that work to one or more subcontractors
 - Prime has privity of contract with the government, and is responsible/ liable for performance of the contract
 - Prime/ Sub Teams are ultimately governed under state law, but important principles apply



TEAMING AGREEMENT

- Agreement between the (prospective) prime and the (prospective) subcontractor to pursue a specific opportunity as a team
 - Entered before the prime contract and subcontracts are awarded
 - Lock in each party to the relationship
 - Define their roles on the team and their work in developing the proposal
 - Ensure compliance with requirements at the outset
- FAR does not specifically require TAs
 - Agencies/ specific solicitations might require them



Subcontracts

- Awarded by the prime contractor to the subcontractor after the prime contract is awarded
 - Can be negotiated in advance
 - Replaces/ supersedes the Teaming Agreement
- Detailed provisions relating to subcontractor performance
 - Scope of work
 - Deliverables/ performance benchmarks
 - Payment provisions





SUBCONTRACTING CONSIDERATIONS

- Past performance
 - Relying on a teammate's past performance
 - Earning past performance
- Limitation on subcontracting
- Ostensible subcontractor affiliation
- Enforceability of teaming agreements and subcontracts



TEAMING AGREEMENT



- **Potential TA terms**
 - Identification of parties and their roles
 - Identification of solicitation/ opportunity being pursued
 - Division of responsibilities relating to proposal preparation
 - Anticipated areas of performance under contract
 - Avoid illusory agreements
 - Exclusivity, non-disclosure, and termination provisions
 - Key subcontract provisions (limitation on subcontracting compliance, OCI/ ethics, FAR flowdowns, etc.)



Subcontract terms

- Common subcontract provisions
 - FAR flowdowns; ethics/ OCI provisions
 - Limitation on subcontracting compliance
 - Non-disclosure, non-compete, and non-solicitation
 - Service Contract Act compliance
 - Changes (who/ how authorized)
 - Dispute resolution (internal and external)
 - Termination (convenience and default)

Tip:

Know What You're Getting Into



- Good *past* performance starts with good performance
- Understand contract requirements before bidding
 - Terms bid against are the terms that will be included in the contract
 - Clarify unclear or restrictive requirements
 - Consider a pre-bid protest challenging the terms
 - Consider passing on a solicitation if the terms aren't right

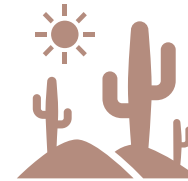
Tip: Don't Be a Stranger



**Understand the lines of
communication**



**Maintain open
communication with CO**
Communicate issues *in writing*
Confirm scope/ schedule/ cost changes



**Keep detailed,
contemporaneous records**

Tip: Independent Pricing



Certify

Contractor must certify that their price was arrived at independently

- Cannot disclose to a competitor, for the purpose of restricting competition, pricing (including methodology) or the intention to submit a bid

Do not disclose

Do not disclose pricing prior to bid opening

Do not make

Do not make any effort to induce another contractor to submit or not submit a bid

Waste, Fraud, and Abuse



- Every employee has a protected right to report any instances of waste, fraud, or abuse to appropriate investigative or law enforcement personnel
 - FAR prohibits confidentiality agreements or employment considerations from impeding this right
- Protection extends to subcontractors/ teaming partners
 - Teaming agreements and subcontracts cannot restrict this ability
- **With each employees' commitment to following rules, hopefully such a report would never be necessary. Again, if you have concerns, please raise them to your supervisor or counsel.**



What are FAR Flow-downs?

- Certain FAR clauses include language requiring that they be included in any subcontracts associated with performance of the work.
- The process of including those clauses in the subsequent subcontract is colloquially known as flowing them down
 - Hence: “flow-down” provisions

How do you know a provision must be flowed down?

- If a clause must be flowed down, it will include a provision like this:
 - “The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that exceed the threshold specified in FAR 3.1004(a) on the date of subcontract award and a performance period of more than 120 days.”
- That’s from FAR 52.203-13 – Contractor Code of Business Ethics and Conduct
 - The threshold referenced is \$6 million
 - Requires the establishment of a code of business ethics

Other Common FAR Flow-downs

- FAR 52.203-19, a Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
- FAR 52.204–23, Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities
- FAR 52.204–25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
- FAR 52.222-21, Prohibition of Segregated Facilities
- FAR 52.222-41, Service Contract Labor Standards
- FAR 52.222-55, Minimum Wages Under Executive Order 13658
- FAR 52.222-62 Paid Sick Leave Under Executive Order 13706
- FAR 52.223-18, Encouraging Contractor Policies to Ban Text Messaging While Driving
- FAR 52.225–26, Contractors Performing Private Security Functions Outside the United States
- FAR 52.226–6, Promoting Excess Food Donation to Nonprofit Organizations
- FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems
- FAR 52.222-26, Equal Opportunity
- FAR 52.225-13, Restrictions on Certain Foreign Purchases
- FAR 52.222-50, Combating Trafficking in Persons

LIMITATION ON SUBCONTRACTING COMPLIANCE



No One Likes a Pass-Through

- To preserve the purpose of set-aside contracts, the SBA limits the extent to which federal contracts may be further subcontracted.
- The overarching goal is to have small businesses benefit directly from the work awarded to it.
- Allowing small businesses to subcontract most or all of a contract to a large business defeats the purpose of the set-aside program.





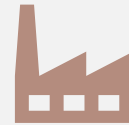
Two sides of the Same Coin

- The Limitation on Subcontracting and Non-Manufacturer rule operate together to ensure small businesses benefit from set-aside contracts.
- Each contract will apply *either*:
 - The Limitation on Subcontracting Rule;
or
 - The Non-Manufacturer rule.
- The rule applied depends on the NAICS code assigned

The Default Rule and the Exception



The Limitation on Subcontracting applies to all set-aside contracts; it is the default.



The Non-Manufacturer Rule is a compliance exception to the Limitation on Subcontracting for contracts for Supplies.



Only contracts assigned Manufacturing NAICS codes may utilize the Non-Manufacturer Rule.

What is the Limitation on Subcontracting?



In general, the limitation on subcontracting is a limit on the amount of small business or socio-economic set aside work that can be given to a subcontractor

It's measured in terms of dollars, not sweat

The Court of Federal Claims has held that the limitation on subcontracting is a material term of the contract

Double Trouble

For many years there were differences between the two distinct regulations that define the limitations on subcontracting

- 13 C.F.R. § 125.6 – The SBA rule
- FAR 52.219-14 – The FAR rule

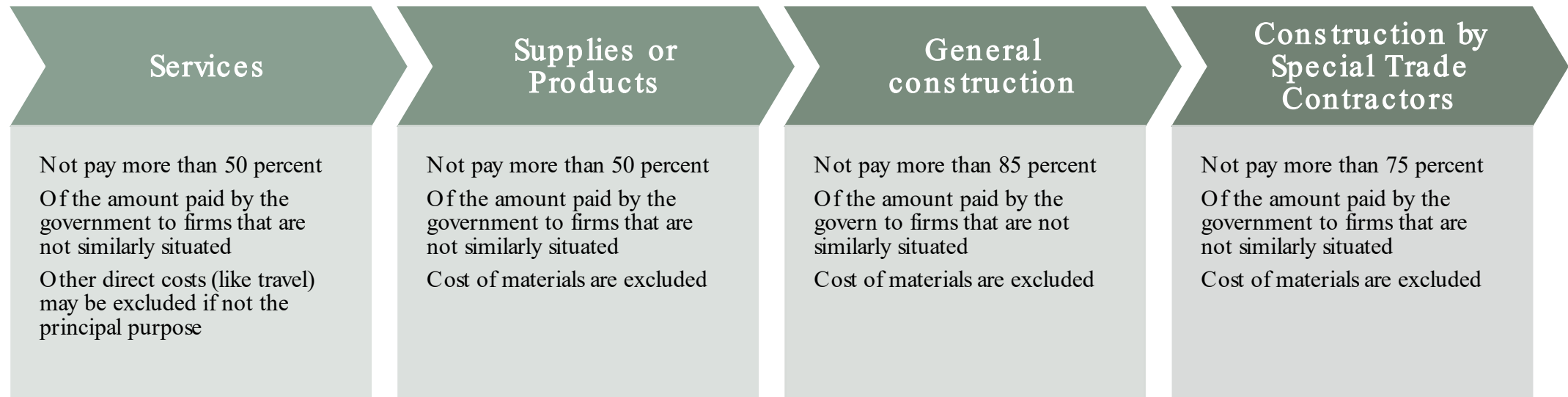
Why?

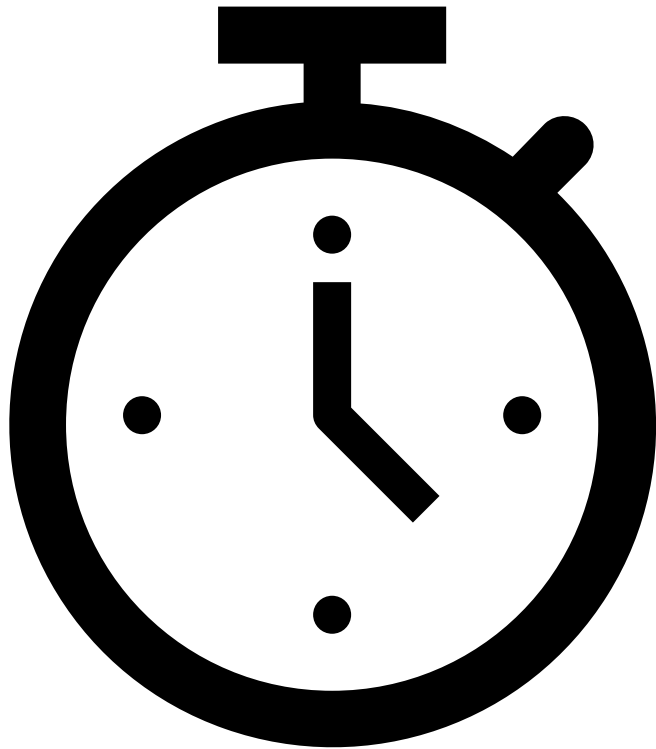
Congress changed the way it wanted the limitation on subcontracting measured with the 2013 National Defense Authorization Act (NDAA)

- The SBA updated its rule in 2016
- The FAR did not (until the FAR council's final rule on Sept. 10, 2021)



Limitations on Subcontracting





Period of measurement

Regular contract

- Base term
- Each option period

Order

- Period of performance of order

IMPORTANT

- Compliance is an element of responsibility
- NOT size eligibility





Mixed Contracts

The NAICS code determines the limitation

- E.G., a services code = a services contract
- The non-services component is not measured

Similarly Situated

A similarly situated entity is

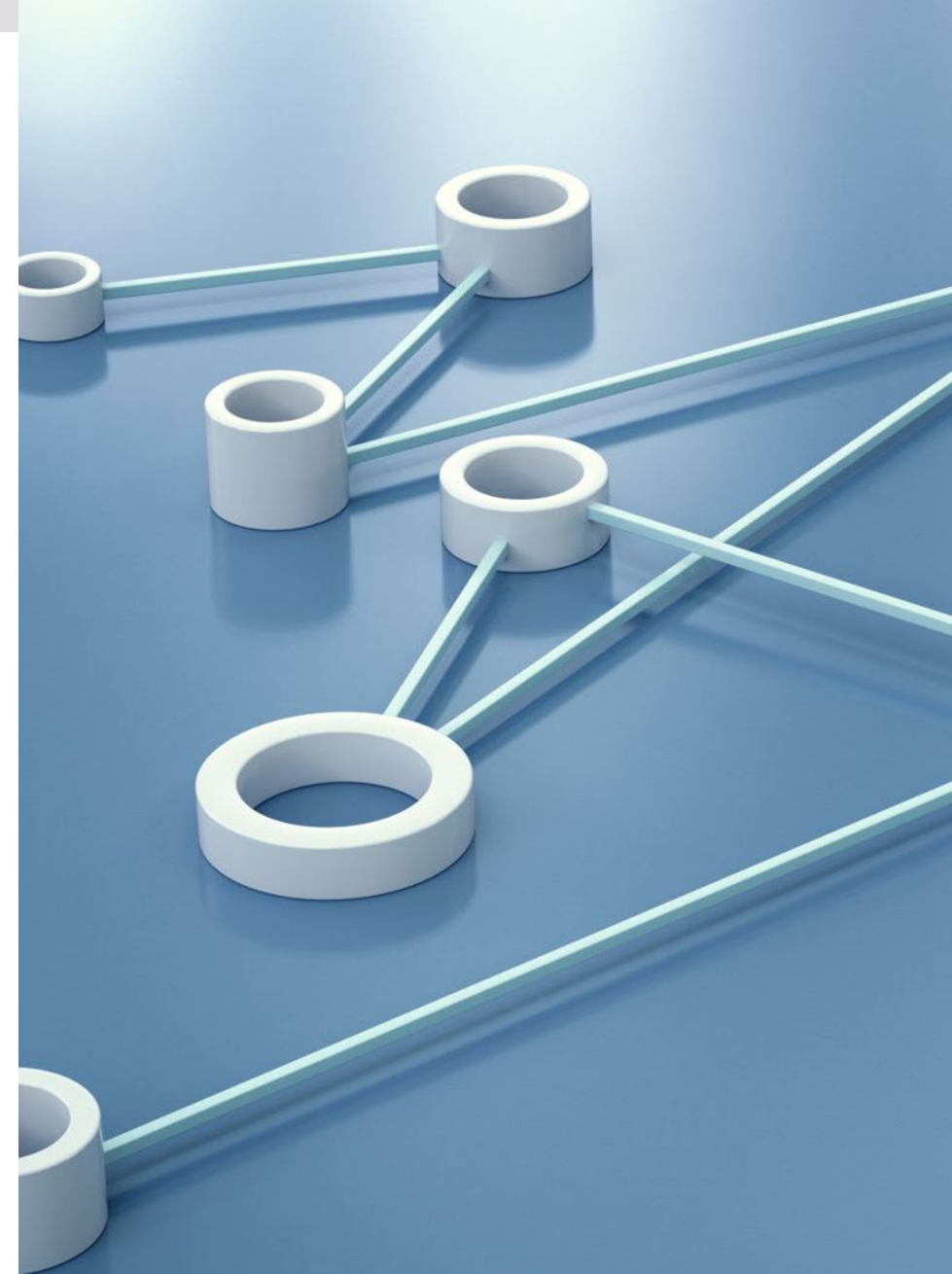
- a subcontractor with “the same small business program status as the prime contractor” and
- small for the NAICS code assigned

Contractors need to be careful to assign a NAICS code to subcontracts

Subcontracts to similarly situated entities are not considered subcontracted dollars

If the subcontractor subcontracts the work to a concern that is not similarly situated, that work counts toward the limitation

A similarly situated entity cannot be an ostensible subcontractor





The Small business Exception

The limitation on subcontracting does not apply to a “small business” set aside that is

- Greater value than the micro purchase threshold
- Lesser value than the simplified acquisition threshold

Penalties

Contracting officers can ask for proof that a contractor is complying

Small Business Act

- Misrepresentation of size or socioeconomic status
- Fine of \$500,000 or the amount subcontracted over the limit
(Whichever is higher)
- 10 years in prison
- Suspension/ Debarment



Nonmanufacturer Rule

Carve out from the limitation on subcontracting

Remember, the limitation on subcontracting requires the small business to self perform at least a certain percentage of the work

- When the work involves supplies, the concern must either self perform at least 50 percent of the manufacturing or
- Comply with the nonmanufacturer rule
- Unless waiver

The Rule (13 C.F.R. § 121.406) is literally called “How does a small business concern qualify to provide manufacture products or other supply items under a small business set-aside, service-disabled veteran-owed small business, HUBZone, WOSB or EDWOSB, or 8(a) contract?”

Only applies to contracts assigned a manufacturing or supply NAICS code or Information Technology Value Added Reseller (ITVAR)



What is a Nonmanufacturer?

Nonmanufacturer is

- Less than 500 employees—or 150, for NAICS code 541519 Information Technology Value Added Resellers (ITVAR) exception
- Primarily engaged in retail or wholesale trade—normally sells the type of item supplied
- Takes ownership OR possession of the items
With its personnel, equipment, or facilities
In a manner consistent with industry practice
- Will supply the end item
Of a small business manufacturer
Made in the United States



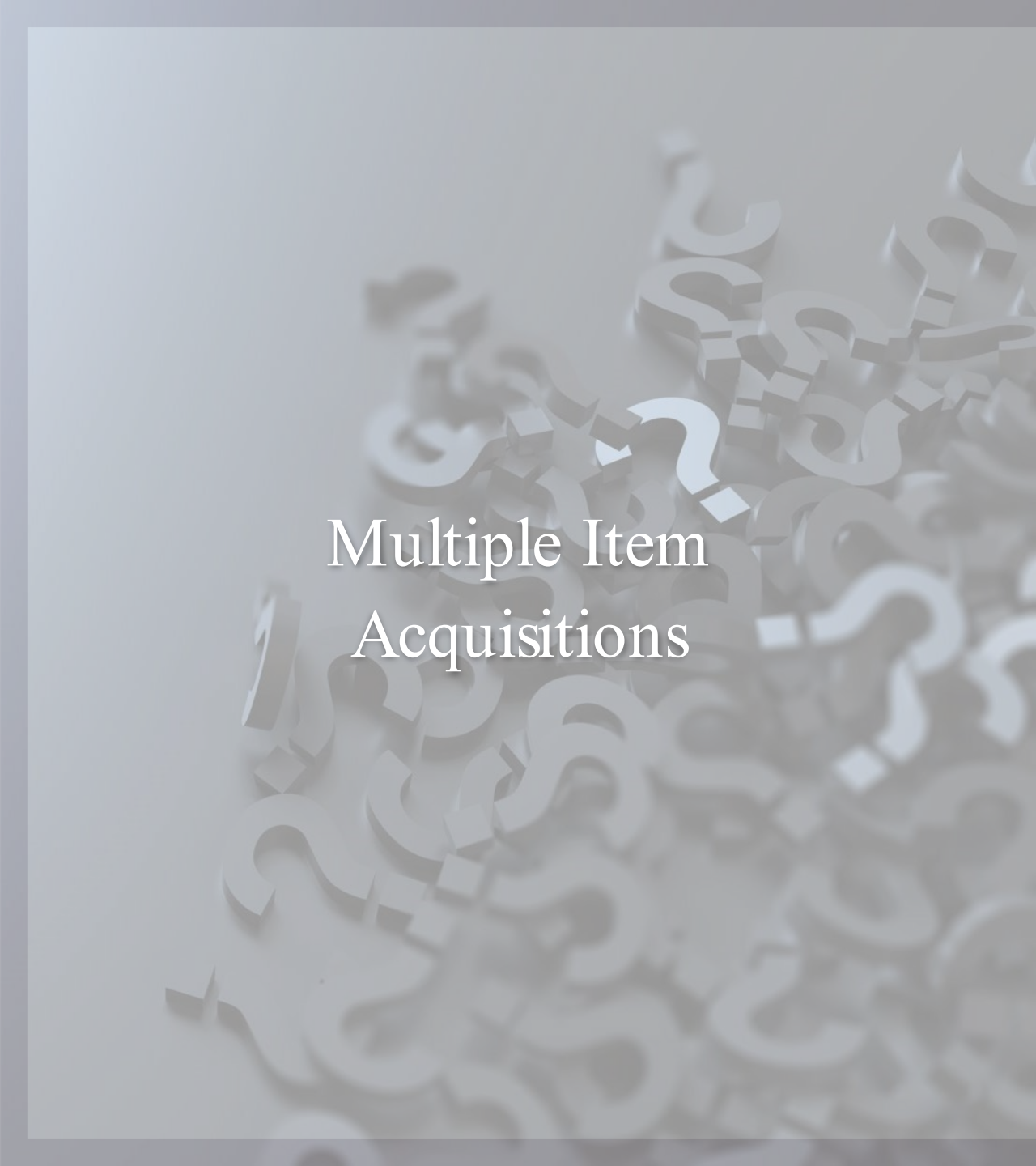
Manufacturer Defined

The entity that, with its own facilities, transforms raw components into end item

- Proportion of total value of item
- Labor costs
- Elements/ functionality added
- Technical capabilities, plant, warranty, etc.

Can only be one manufacturer for size purposes





Multiple Item Acquisitions

If more than half of the estimated value of the contract is items manufactured by small business concerns, no waiver is required

If less than half of the estimated value of the contract is items manufactured by small business concerns, a waiver is required

- SBA may waive the rule for specific items in order to change the calculus so that more than 50 percent of the remaining items are made by small businesses

If a contractor will supply both items it manufactured and items it did not, the regular size standard and limitation on subcontracting apply

Mixed Contract

The nonmanufacturer rule applies only to the supply component of the work

- If a services contract has a supply component, that doesn't matter—the nonmanufacturer rule does not apply



Waivers



Individual waiver—The contracting officer determines that no small business manufacturer or processor reasonably can be expected to offer a product meeting the specifications (including period for performance) required by a particular solicitation and SBA reviews and accepts that determination

Class waiver—SBA determines that no small business manufacturer or processor of the product or class of products is available to participate in the Federal procurement market

Nonmanufacturer rule waiver does not waive Buy American Act or Trade Agreements Act requirements regarding manufacture country of origin

Class Waivers

Each NAICS code includes Product and Service Codes (PSC)—
within PSCs are subdivisions of products that can be considered for a
waiver

Any individual or organization (government agency, business,
association, etc.) may request a waiver for a class of products

Request

- In writing
- To Associate Administrator for Government Contracting
- State the class(es) of products for which the waiver is sought

Takes about 45 to 60 days

Class Waivers—Examples

Tuna, Canned

Thesauruses &
Dictionaries

Small Arms,
Ordnance, And
Ordnance
Accessories

Trucks, Four
Wheel Drive
Utility

Commercially
available off-the-
shelf laptop and
tablet computers

Video Cassette
Recorders (1993)

Television Sets

Aircraft

Furniture Frames

Individual Waivers

The contracting officer is the only one who can ask for an individual waiver

The request must include

- A definite statement identifying the specific products for which the waiver is sought
- The market research supporting the determination that there are no known small business manufacturers
- The solicitation number, NAICS code, estimated value of the procurement, and procurement history

For contracts expected to exceed \$500,000, a copy of the Statement of Work.

- A determination that there are no known small business manufacturers for the requested items.

Including a clear, narrative statement of the contracting officer's efforts to search for small business manufacturers

Should include

- SBA's Dynamic Small Business Search
- Market surveys performed
- Discussions with small business representatives (i.e., OSDBU or PCR)
- A statement by the contracting officer that there are no known small business manufacturers for the items and that no small business can reasonably be expected to offer the required supplies.

A contracting officer may request an individual waiver for more than one item on a solicitation

Takes about 15 working days

MENTOR -
PROTÉGÉ
PROGRAMS



SCHOONOVER
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LLC

DEPARTMENT OF DEFENSE'S
MENTOR-PROTÉGÉ PROGRAM



MENTOR-PROTÉGÉ PROGRAM

OVERVIEW

- DoD's Mentor/ Protégé Program is agency specific
- Develops small business capability, with the goal of strengthening the supply chain
 - Mentor guides protégé through working with DoD

PERMANENTLY AUTHORIZED

- 2020 NDAA proposed permanent authorization
- 2023 NDAA codified the program

ELIGIBILITY

Protégés

- Small business (size half of primary NAICS code) and
 - Any socio-economic designation
 - Non-traditional defense contractor, or
 - Employs severely disabled
- Only one active MPA at a time

Mentors

- Established DoD contractor
 - Contracts over \$100m in preceding year
 - Decreasing to \$25m
 - Active subcontracting plan
 - 8(a) graduate
- Must be approved as a mentor by DoD's Office of Small Business Programs

MENTOR-PROTÉGÉ AGREEMENT

DoD has a template agreement available

Core of agreement is listing:

- Protégé's needs
- Assistance that mentor will provide to meet those needs
- Explain how the relationship will benefit DoD

Type of arrangement

- Direct-reimbursed

Mentor receives reimbursement of allowable costs of developmental assistance to protégé

- Submit to OSBP

Pilot program: protégé receives portion of reimbursement?

- Credit

Mentor receives credit toward subcontracting goals

- Submit to DCMA





MENTOR-PROTÉGÉ DURATION



Agreement lasts for three years

- Unusual circumstances may allow for an extension, but in no event more than 5 years

Reporting requirements

- Mentor and Protégé must submit semi-annual reports about progress made
 - Protégé must submit an annual report
- Two years after agreement: continuing data

TAKEAWAYS



- Prime/ subcontractor teams
 - Allow firms to customized solution for each procurement.
- 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!
- Mentor-protégé programs offer significant benefits
 - Small businesses can receive significant mentoring from established and experienced businesses.
 - The program offers affiliation protection, joint venturing possibilities, and capital raising opportunities.

SMALL BUSINESS
ADMINISTRATION'S
MENTOR-PROTÉGÉ PROGRAM



SBA 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) "rolled into" ASMPP 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 Duration

- Relationship lasts for up to six years
- SBA reviews the relationship annually
 - Unless rescinded in writing, it's automatically renewed
 - During the 30 days prior to annual anniversary, protégé must report: technical/ management assistance; loans or investments made by mentor; subcontracts between the two; federal contracts awarded to the pair as a joint venture; narrative describing the success of assistance provided by mentor; mentoring services by category and hours





Mentor-Protégé Limitations

- Protégé can usually only have one mentor at a time
 - Protégé can have a second simultaneous one if it doesn't conflict with the first (e.g., a second NAICS code or protégé wants expertise that the first mentor doesn't have)
 - Protégé can only have two mentors during its lifetime
- Mentors usually have one protégé at a time, but can have up to three
 - Additional relationships can't prejudice the others
 - No lifetime max
- A firm can be a protégé and mentor at the same time, if there's no conflict (e.g., different NAICS codes)



ELIGIBILITY

- Protégés
 - Must be organized for profit
 - Must qualify as small in its primary NAICS code (or identify a secondary NAICS code that it is seeking to develop)
 - For a secondary NAICS code, must have some pre-existing capabilities and experience
 - Affiliation rules apply
 - Not required to have a particular socio-economic designation
- Mentors
 - Must be organized for profit
 - Must demonstrate that it can provide the assistance set forth in the mentor-protégé agreement
 - Possesses good character
 - Not debarred or suspended federal contractor
 - Can impart knowledge through experience or knowledge of general business operations

ADVANTAGES

Small business development

- The mentor responsible for providing the assistance items with the mentor-protégé agreement

Affiliation exceptions

- A mentor and protégé will not be affiliated for engaging in the SBA approve assistance items.

Mentor-protégé joint venture

- A compliant mentor-protégé joint venture will qualify for any small business set-asides that the protégé member qualifies.

Regardless of the mentor firm's size!

Equity investment

- Mentor can make 40% equity investment to provide capital for protégé



A silhouette of two people high-fiving on a cliff edge at sunset. The sky is a gradient of blue and orange, and the ocean is visible in the background.

MENTOR-PROTÉGÉ JOINT VENTURES

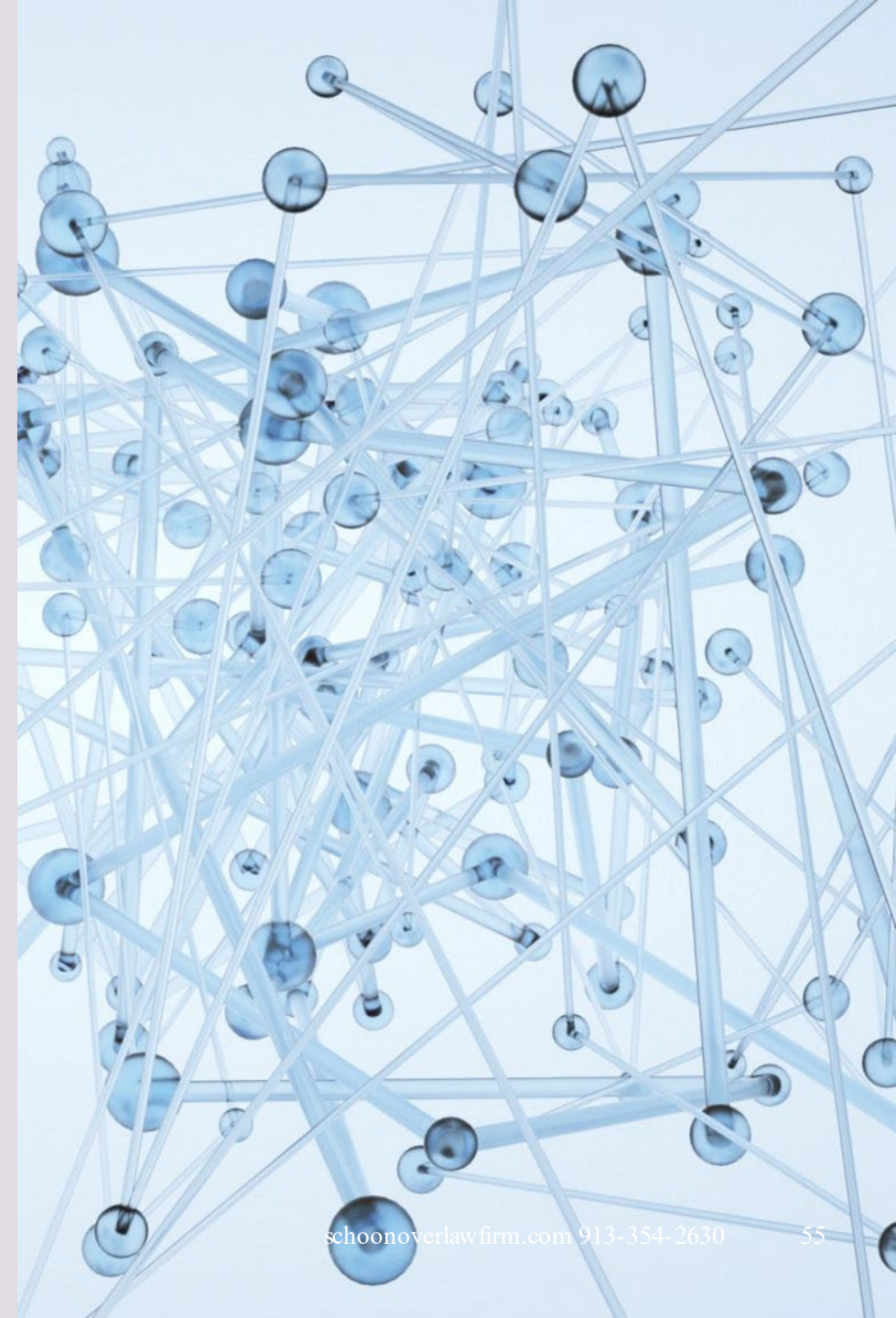
- Mentor-protégé relationship does not establish an automatic joint venture
- Mentor-protégé joint venture must still abide by:
 - Joint venture work share requirements
 - Applicable limitation on subcontracting
- SBA must approve the mentor-protégé agreement before the joint venture can submit an offer 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



Thank you!

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