Planning to Joint Venture on a Small Business Set-Aside Procurement?

What you need to consider to comply with small business size requirements…

- As you probably know, in order to qualify as a small business on a small business set-aside procurement, the offeror must meet the size standard that corresponds to the NAICS Code assigned to the solicitation.

- It is anticipated that the size standard for the 40mm procurement will utilize a 1,500 employee size standard.

General Rule

- When it comes to Joint Ventures (JVs), the general rule is that parties to the JV are considered affiliates of each other for purposes of the specific procurement. This means that generally, you must *combine* all the employees of all the JV partners and determine if the *combined* number of employees meets the size standard. **HOWEVER**…

- Due to the anticipated dollar values of the awards under the 40mm procurement, an exception to the general rule is expected to apply. Instead of having to *combine* all of the employees of all of the JV participants, a "relaxed rule" will apply.

What is the “relaxed rule”?

- In plain English, the relaxed rule says that so long as each JV partner *individually* qualifies as a small business, then the JV counts as small.

- The “relaxed rule” is found in the size regulations at 13 CFR 121.103(f)(3)(i).

The regulation at 13 CFR 121.103(f)(3)(i) reads:

- (i) A joint venture or teaming arrangement of two or more business concerns may submit an offer as a small business for a Federal procurement without regard to affiliation under this paragraph (f) so long as each concern is small under the size standard corresponding to the NAICS code assigned to the contract, provided:

13 CFR 121.103(f)(3)(i), continued

- (A) The procurement qualifies as a "bundled" requirement, at any dollar value, within the meaning of 125.2(d)(1)(i) of this chapter; <u>or</u>

- (B) the procurement is other than a "bundled" requirement within the meaning of 125.2(d)(1)(i) of this chapter, <u>and</u>:

13 CFR 121.103(f)(3)(i), continued

- (1) For a procurement having a revenue-based size standard, the dollar value of the procurement, including options, exceeds half the size standard corresponding to the NAICS code assigned to the contract; <u>or</u>

- (2) For a procurement having an employee-based size standard, the dollar value of the procurement, including options, exceeds $10 million.

One more time, in plain English:

- The "relaxed rule" means that so long as each JV partner *individually* qualifies as a small business, then the JV counts as small.

- In other words, a Large Business CANNOT be a member of the Joint Venture. *(Exception to this rule exists for 8(a) firms—to be discussed later.)*

But can a Large Business participate on a small business set-aside procurement?

- Yes, so long as the Large Business is just an arm's length subcontractor. Keep in mind that size trouble arises if the LB subcontractor will perform "primary and vital requirements" of the contract or if the JV is "unusually reliant" upon the LB subcontractor. (This is known as ostensible subcontracting.)

Ostensible Subcontracting 13 CFR 121.103(f)(4) reads:

- A contractor and subcontractor are treated as joint venturers if the ostensible subcontractor will perform primary and vital requirements of a contract or if the prime contractor is unusually reliant upon the ostensible subcontractor. All requirements of the contract are considered in reviewing such relationship, including contract management, technical responsibilities, and the percentage of subcontracted work.

Under the “relaxed rule,” Ostensible Subcontracting with a LB would be a problem.

- Why? Because the LB ostensible subcontractor would be treated as a party to the JV…and the “relaxed rule” requires that all parties to the JV qualify as small.

Consequences of Ostensible Subcontracting

- If someone believes that your relationship with a LB is actually ostensible subcontracting, a size protest alleging ostensible subcontracting could result.
- If SBA were to conclude that a LB subcontractor was, in fact, going to be performing the "primary and vital requirements" of the contract or that the JV would be "unusually reliant" upon the LB subcontractor, that would cause the JV to <u>NOT</u> qualify as a small business.

But what if the solicitation directs that a particular Large Business must perform certain functions or provide certain components?

- The LB cannot be a member of the JV, but the LB can be utilized as directed by the solicitation without causing or leading to ostensible subcontracting.

What about 8(a) firms and Mentor/Protégé Agreements?

- 13 CFR 121.103(f)(3)(iii) says: Two firms approved by SBA to be a mentor and protégé under 13 CFR 124.520 may joint venture <u>as a small business</u> <u>for any Federal Government procurement</u>, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement and, for purposes of 8(a) sole source requirements, has not reached the dollar limit set forth in 13 CFR 124.519.

In plain English, this means…

- An 8(a) firm that meets the size standard could enter into an SBA-approved mentor/protégé agreement with a Large Business mentor. The mentor and protégé can form a JV and be eligible for award of the small business set-aside procurement even though the mentor/JV partner is a large business.

Additionally,

- The SBA-approved mentor/protégé JV could then be party to a JV consisting of other small businesses and that JV could qualify under the "relaxed rule."
- How? The relaxed rule says all parties to the JV must individually qualify as small.
  - Per 13 CFR 121.103(f)(3)(iii), the SBA-approved mentor/protégé JV qualifies as small.

How do you determine if a JV meets the "relaxed rule"?

- To see if a JV meets the "relaxed rule," each member of the JV will need to determine if it qualifies as a "small business."
- A JV between an SBA-approved Mentor/Protégé qualifies as small pursuant to 13 CFR 121.103(f)(3)(iii).
- For parties to the ultimate JV offeror that are *not* SBA mentor/protégé JVs, when calculating number of employees, each member of the JV must include not only its own employees, but also the employees of its own affiliates.
  - The calculation includes ALL employees of ALL affiliates--WORLDWIDE.

What is an affiliate?

- In plain English, affiliates are any other businesses owned and/or controlled by the same person/people/group/entity/etc.--*regardless* of the line of work they're in.

- For the official, regulatory definition of affiliate, see 13 CFR Part 121.103.

Back to the calculation... 13 CFR 121.106

- In calculating "number of employees," SBA counts full-time, part-time and temporary employees the same.
  - Calculation does not use full-time equivalents (FTEs);
  - One part-time employee counts the same as one full-time employee who counts the same as one temporary employee;
  - Count the employees by pay period.

Calculating Number of Employees, continued

- A business' "number of employees" is a twelve month average based on the number of people employed by pay period during the last 12 completed calendar months prior to when you submit your written small business self-certification as part of your initial offer including price.

  (13 CFR 121.404)

Examples

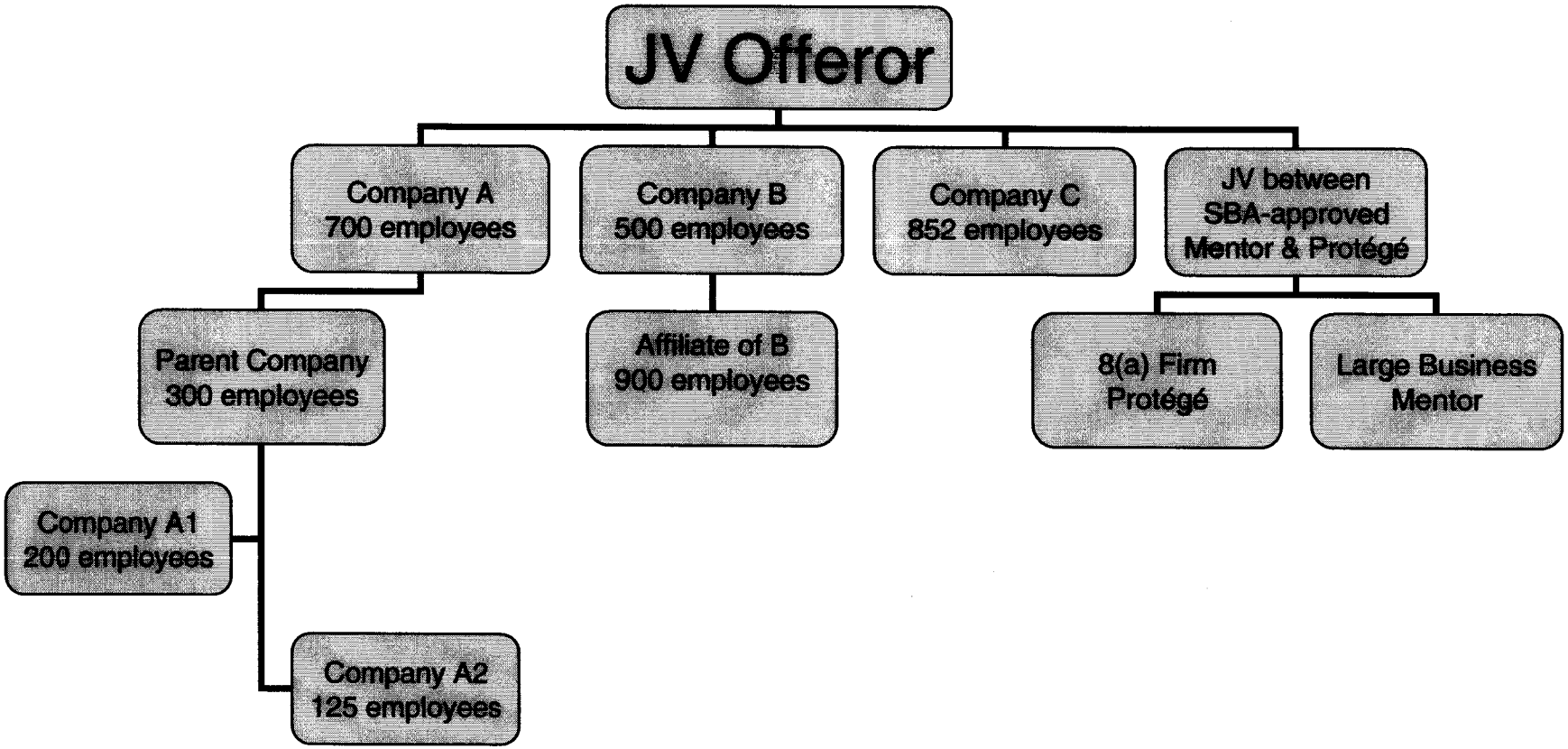
- If you submit your initial offer including price in January 2004, your number of employees is calculated by averaging the number of employees <u>during each pay period</u> from January 2003 through December 2003.

- Similarly, if you submit your initial offer including price in May 2004, your number of employees is calculated by averaging the number of employees <u>during each pay period</u> from May 2003 through April 2004.

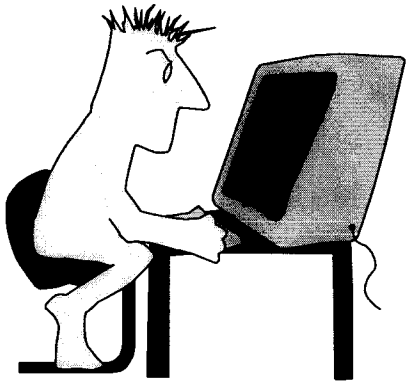
Hypothetical JV Offeror consisting of a JV with 4 members:

Company A and its three affiliates average 1325 employees, therefore it's small;
Company B and its one affiliate average 1400 employees, therefore it's small;
Company C has no affiliates and averages 852 employees, therefore it's small;
The JV between the SBA-approved mentor & protégé qualifies as small pursuant to 13 CFR 121.103(f)(3)(iii).

Since all 4 members of the JV individually qualify as small, the JV Offeror meets the "relaxed rule" and is eligible for award of the small business set-aside procurement.



Websites



- To find the Code of Federal Regulations (CFR) on-line, visit:

- http://www.access.gpo.gov/nara/cfr/waisidx_03/13cfrv1_03.html

Size regulations -- 13 CFR Part 121

8(a) regulations -- 13 CFR Part 124

Resources

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