

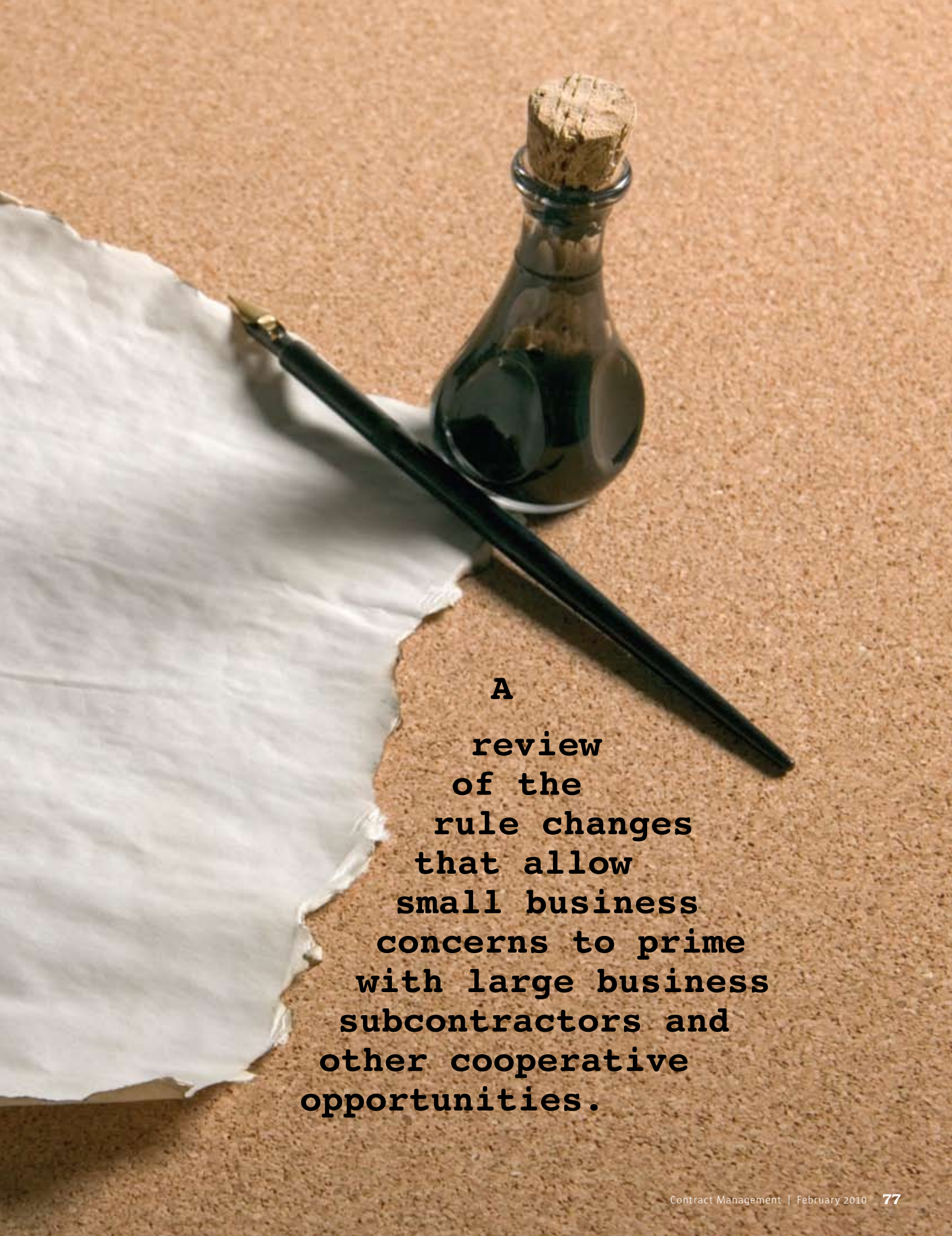


*Small Business
Administration
Joint Venture
Rules*

BY BRUCE P.

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A corked glass bottle, a fountain pen, and a piece of torn paper are arranged on a corkboard background. The bottle is dark and has a cork stopper. The pen is black with a gold nib. The paper is white and has a jagged, torn edge. The text is centered on the corkboard, below the pen and bottle.

**A
review
of the
rule changes
that allow
small business
concerns to prime
with large business
subcontractors and
other cooperative
opportunities.**

*In recent years, contractors have been experiencing a high incidence of “bundled” procurement actions initiated by the federal government. The term **bundled procurement** refers to the consolidation of two or more procurement requirements for goods or services previously provided or performed under separate, smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small business. The current trend toward bundled procurement actions is the federal government’s attempt to create best value by streamlining its procurement processes, improving its efficiency of contract management, and reducing costs.*

The contractor community response to the bundling of procurement initiatives via prime/subcontractor relationships has lost momentum in favor of special business partnerships such as joint ventures and teaming agreements. To carry out the work, companies create new business structures in the form of Limited Liability Corporations (LLCs). Contractors now offer joint ventures/LLCs as a best value solution to their customer (the government), which provides more streamlined contract management and reduces costs when compared to the traditional “tiered” prime/sub relationships.

The Small Business Administration (SBA) is vigilant about monitoring the federal government’s use of bundled procurements and the possible reduction in the ability of small businesses to compete in the government marketplace. SBA also continues to explore ways to enhance small business competitiveness for large contracts, such as contractor teaming arrangements. SBA has recently issued new rules that have created new advantages to small businesses and the concept of teaming or joint venturing that make them more attractive for certain procurements.

How Does SBA Define a “Joint Venture”?

A *joint venture* is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, expressed or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two-year period. These

businesses combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally.¹ This means that the joint venture entity cannot submit more than three offers over a two-year period starting from the date of the submission of the first offer.

A joint venture may or may not be in the form of a separate legal entity. The joint venture is viewed as a business entity in determining power to control its management. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists.²

Affiliations

Normal Affiliation

Under the normal SBA affiliation rules, the members of a joint venture or team are considered to be “affiliated” for size purposes. The size of each team member contributes to the total size of the joint venture or team. The joint venture or team is considered “small” only if the combined annual receipts or number of employees of all the firms in the joint venture or team meet the assigned size standard for the procurement action.³

Relaxed Affiliation

With the new SBA rules, there is an exception to the normal rules of affiliation for joint ventures or teams on procurement actions that meet certain requirements, such as:

- A bundled procurement of any dollar value,
- A procurement having a receipts-based size standard where the dollar value of the procurement exceeds one-half of the size standard, or
- Procurements having an employee-based size standard where the dollar value of the procurement exceeds \$10 million.

For procurement actions that meet these certain requirements, the joint venture or prime/sub team is considered “small” so long as each joint venture or prime/sub member is “small” under the size standard (receipts-based or employee-based) assigned to the procurement action.

Relaxed affiliation means that so long as each joint venturer (in the case of a joint venture) or team member (in the case of a teaming arrangement) individually qualifies as a “small business,” then the joint venture or teaming arrangement qualifies as “small.” Relaxed affiliation rules apply to small business joint ventures and teams only on procurement actions that meet these requirements.⁴

Performance of Work Requirements

Normal Work Requirements

Performances of work requirements are included in procurement actions only if the contractor must be small to be eligible for

award. *Federal Acquisition Regulation (FAR)* 52.219-14, "Limitations on Subcontracting," specifies the percent of contract work that must be performed by the small business prime contractor.⁵

Relaxed Work Requirements

With the new SBA rules, where an offeror is exempt from the normal affiliation under 13 C.F.R. 121.103(h)(3) and qualifies as a "small business concern," the performance of work requirements apply to the cooperative effort of the joint venture or team, but not its individual members.⁶

Other Small Business Joint Venture Relationships

8(a) Protégé Firm Joint Ventures

For any federal government procurement:

- An 8(a) protégé firm may joint venture with its SBA-approved mentor,
- The joint venture is considered "small" so long as the 8(a) protégé qualifies as "small" for the procurement,
- Performance of work requirements apply to the cooperative effort of the joint venture,
- The contract is in the name of the joint venture entity, and
- The contract performance responsibility

lies with the joint venture.

As previously stated, a joint venture business entity may submit up to three offers over a two-year period starting with the date of the submission of the first offer.⁷

8(a) Joint Ventures Non-Protégé Teams

For competitive 8(a) procurement actions⁸ versus restricted (i.e., development stage or geographic) 8(a) competitions⁹ that meet certain requirements:

- An 8(a) firm can enter into a joint venture with one or more other businesses and the joint venture is considered "small" so long as each joint venture member is "small" under the size standard (receipts-based or employee-based) for the procurement action,
- Performance of work requirements apply to the cooperative effort of the joint venture, and
- The size of at least one 8(a) member of the joint venture must be less than one-half of the size standard for the procurement.

For any 8(a) procurement that does not meet certain requirements:

- Any joint venture between an 8(a) protégé firm and its approved SBA mentor is considered "small" so long as the 8(a) protégé is "small" under the

procurement,

- The mentor firm may be a large business concern, and
- Performance of work requirements apply to the cooperative effort of the joint venture.

The 8(a) joint venture agreement must be approved by SBA prior to award of the contract. It must also complete the followings actions:

- Set forth the purpose of the joint venture,
- Designate the 8(a) participant as the managing company of the joint venture and an employee of the managing company of the joint venture as the project manager responsible for contract performance,
- Certify that 51 percent of the net profits of the joint venture go to the 8(a) participant(s),
- Provide for the establishment of a bank account in the name of the joint venture, and
- The joint venture agreement must contain all the provisions listed in 13 C.F.R. 124.513(c).

The option of 8(a) prime/sub teaming does not appear to be an alternative contemplated by the new SBA rules.



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- Use sidebars and illustrative charts, graphs, figures, and tables when appropriate.
- Use endnotes to cite sources when appropriate.
- Include a brief biography at the end, which should include your job title, employer name and location, NCMA chapter affiliation, and certifications held.



Small Disadvantaged Business Joint Ventures

Small disadvantaged business (SDB) joint ventures are permitted under the new SBA rules¹⁰ in order to allow SDB joint ventures to take advantage of SDB procurement mechanisms such as:

- Price evaluation adjustments,
- Evaluation factors or subfactors,
- Monetary subcontracting incentives, and
- SDB set-asides.

The disadvantaged business participant in the joint venture must have SBA SDB certification or have submitted an application for certification and not received a negative determination. The SDB must be the managing company of the joint venture and an employee of the SDB must be the project manager responsible for contract performance. A SDB prime/sub teaming relationship does not appear to be an option allowed by the new SBA rules.

Service-Disabled Veteran-Owned Small Business (SDVOSB) Joint Ventures

For competitive service-disabled veteran-owned small business (SDVOSB) procurements that meet certain requirements:

- A SDVOSB firm can form a joint venture with one or more other businesses so long as each joint venture member is “small” for the procurement, and
- Performance of work requirements apply to the cooperative effort of the joint venture.

SDVOSB joint venture agreements must:

- Set forth the purpose of the joint venture,
- Designate the SDVOSB as the managing company of the joint venture and an employee of the managing company of the joint venture as project manager, and

- Certify that at least 51 percent of the net profits earned by the joint venture will go to the SDVOSB venturer(s).

SDVOSB prime/sub teaming does not appear to be an option contemplated by the new SBA rules.¹¹

Historically Underutilized Business Zone Joint Ventures

For historically underutilized business zone (HUBZone) procurements that meet certain requirements:

- HUBZone small business firms can joint venture with one or more other HUBZone-certified firms to submit an offer for a HUBZone contract so long as each joint venture member is “small” for the procurement, and
- Performance of work requirements apply to the cooperative effort of the joint venture.

HUBZone small business prime/sub teaming does not appear to be an option contemplated by the new SBA rules.

For procurements that do not meet certain requirements:

- The joint venture is “small” only if the combined annual receipts or employees of all firms in the joint venture meet the size standard for the procurement, and
- Performance of work requirements still apply to the cooperative effort of the joint venture.

Conclusion

SBA has responded in kind to procuring agencies’ bundling efforts and their associated effects. The collateral damage of bundling has severely limited small business concerns’ ability to compete. SBA’s revising of the “rules of engagement” has again leveled the playing field for small business concerns to compete on large “bundled” procurements.

While the “rules of engagement” have leveled the playing field, the contractual, statutory, and compliance requirements (i.e., those of the FAR, the Cost Accounting Standards, and the Defense Contract Audit Agency) in the performance of the contract have not changed. The joint venture/teaming business entity is still held to the same standards of compliance and execution as before. The contractual, statutory, and compliance requirements still must be met. In short, while the “rules of engagement” have changed, the “rules of performance” have not. **CM**

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ENDNOTES

1. 13 C.F.R. 121.103(h).
2. 13 C.F.R. 121.103(h)(4).
3. 13 C.F.R. 121.103(h)(2).
4. 13 C.F.R. 121.103(h)(3).
5. 13 C.F.R. 125.6.
6. 13 C.F.R. 125.6(h)(i).
7. 13 C.F.R. 121.103(h).
8. Refer to 13 C.F.R. 124.507.
9. Refer to 13 C.F.R. 124.507(c).
10. See 13 C.F.R. 124.1002(f).
11. See 13 C.F.R. 125.15(b).

