TRAVELERS

BOND & FINANCIAL PRODUCTS

CONSTRUCTION SERVICES

GOVERNMENT CONTRACTING PROGRAMS FOR SMALL DISADVANTAGED BUSINESSES OVERVIEW OF SMALL BUSINESS ADMINISTRATION PROGRAMS

Background

Congress passed the Small Business Act in 1953 to expand on earlier government efforts to directly aid small businesses.[1] The Small Business Administration ("SBA") is charged under the Small Business Act with ensuring government wide goals for participation of small business concerns ("SBCs"). There are five main government contracting assistance programs of the SBA: Prime contracting assistance; Subcontracting assistance; Service-Disabled Veteran-Owned Small Business Concern contracting assistance; Government property sales assistance; and the Certificate of Competency program. The objective of the programs is to assist small businesses in obtaining a "fair proportion" of Federal Government contracts, subcontracts, and property sales. Statutory goals for federal agencies to ensure that small businesses get their fair share have been set as follows:

- 23% of prime contracts for small business concerns;
- 5% of prime and subcontracts for small disadvantaged businesses ("SDB");
- 5% of prime and subcontracts for women-owned small businesses;
- 3% of prime contracts for HUBZone small businesses; and
- 3% of prime and subcontracts for service-disabled veteran-owned small businesses ("SDVOSB").[2]

The concept of small business set-asides, introduced in the 1953 Act, underwent expansion by the 1958 Act to assure small businesses received a "fair proportion" of Government work,[3] and further expansion under the 1978 Amendment creating set-asides for minority owned small businesses.[4] This paper examines the different government program requirements.

Statutory Framework

Chapter 14A of Title 15 of the U.S. Code establishes the framework for aid to small businesses and the SBA. Under 15 U.S.C. §637, the SBA is authorized to enter into contracts with other agencies to let subcontracts for firms eligible for participation. The SBA operates these programs to assist SDBs. The SBA is empowered to enter into contracts with the departments and agencies of the United States for the performance of construction contracts by *"negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work…"*[5] The term "socially and economically disadvantaged small business concerns" means one which is 51% unconditionally owned and controlled by one or more socially or economically disadvantaged individuals, an economically disadvantaged Indian tribe, or an economically disadvantaged Native Hawaiian organization.[6]

Generally, *"socially disadvantaged"* individuals are those who have been subject to racial or ethnic prejudice or cultural bias within our society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.[7] *"Economically disadvantaged"* individuals are those whose ability to compete in the free enterprise system has been impaired due to diminished capital or credit opportunities compared to others in the same business area who are not socially disadvantaged.[8] The participation goal for various small business concerns is established annually by the President, with a Government-wide goal for participation by small business concerns of not less than 23 percent of the total value of all prime contract awards for each fiscal year.[9]

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Statutory Violations

Violations of these federal contracting assistance programs are subject to criminal and civil penalties. Specifically, 15 U.S.C. § 645[10] sets forth the criminal penalties associated with making misrepresentations as to the status of a small business concern. Punishment can include a fine of not more than $500,000 or by imprisonment for not more than 10 years, or both. The violator will also be subject to the administrative remedies prescribed by the Program Fraud Civil Remedies Act of 1986, suspension and debarment and will be ineligible for participation in any contracting assistance program for up to three years.[11]

Fraud upon government contracting assistance programs has been found where (1) there was concealment or non-disclosure to the federal government of the involvement of a non-SDB contractor in the contracts; (2) the SDB contractor subbed out the entirety of the work to the non-SDB contractor; or (3) the non-SDB contractor financed a new division of the SDB contractor with the goal of enhancing/marketing the non-SDB contractor's company. These cased involved long-term ongoing ventures in order to obtain a number of SBA contracts and were not a one-time involvement with a particular SDB contractor.

In United States v. Barker Steel Co., Inc., 985 F.2d 1123 (1st Cir.1993), Barker Steel was a Massachusetts corporation which furnished fabricated re-bar; Rusco was a Rhode Island corporation certified as a minority business enterprise in several states. Barker and Rusco agreed that Barker would finance a new division of Rusco to do steel erection work.[12] Barker then did the "furnish" work to take advantage of Rusco's MBE certification. During the scheme, Rusco submitted documentation with false statements as well as material omissions to keep its MBE certification.[13] The Court found the evidence sufficient to charge the defendants with fraud and conspiracy.[14] Finding that their dishonest conduct was "at the heart of the crime of defrauding the government," the Court found the defendants had sought to divert the benefits of the minority assistance programs to themselves. [15]

In U.S. v. Anderson, 879 F.2d 369 (8th Cir. 1989), the Court examined the conduct of Kathy's Kranes, a small business which became certified as an 8(a) in 1981. Prior to the 8(a) certification, Kathy's Kranes had only performed a few small construction jobs. After certification, it falsely indicated to the SBA that it could do a $750,000 job on its own and that it had a bonding capacity of $1.5 million.[16] Kathy's Kranes then entered into a management agreement with a non-minority construction company, which agreed to provide Kathy's Kranes with a full-time manager, to be its exclusive subcontractor, to furnish bonds, and to advance working capital, among other things.[17] The Court found that there was sufficient evidence "that each defendant, through various acts, concealed from the government the involvement of non-8(a) contractors in the 8(a) contracts awarded to Kathy's Kranes."[18] As such, the defendants were convicted of conspiracy to defraud and making false statements.

Another case involved a construction contractor who falsely certified with its submission of monthly progress payments that it was complying with the 8(a) program when in actuality it was entering into a number of contracts with non-minority subcontractors.[19] Each of the payment vouchers the contractor submitted constituted a false claim, and so the contractor was hit with 22 civil penalties under the False Claims Act. [20]

TYPES OF FEDERAL PROGRAMS

Prime Contracting Assistance

The purpose of the prime federal contracting procurement program is to assist small businesses in obtaining a fair share, or "fair proportion," of federal government contracts. A small business is to receive an award or contract that SBA determines to be in the interest of:

> *(1) Maintaining or mobilizing the Nation's full productive capacity;*
> *(2) War or national defense programs;*
> *(3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or*
> *(4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.*[21]

A prime contractor must be an SBC in order to be eligible for contracts in this program. The purpose of these small business set-asides for prime contracts is to award certain acquisitions exclusively to SBCs. A small business set-aside of a single acquisition or a class of acquisitions may be total or partial.[22] In fact, the most common method by which the federal government gives preference to SBCs is through set-asides. With respect to requirements applicable to construction contracts, the Contracting Officer is to set aside any acquisition over $100,000 for small business participation when there is a reasonable expectation that (1) offers will be obtained from at least two responsible SBCs offering the products of different SBCs and (2) award will be made at fair market prices.[23] Total small business set-asides may be conducted by using simplified acquisition procedures, sealed bids, or competitive proposals.[24]

Subcontracting Assistance

The purpose of the federal government's subcontracting assistance program is to provide the maximum practicable subcontracting opportunities for SBCs. This can include Veteran Owned Small Businesses ("VOSBs"), SDVOSBs, 8(a)s, HUBZones, SBCs owned and controlled by women, and SBCs owned and controlled by socially and economically disadvantaged people.

The subcontracting assistance program implements section 8(d) of the Small Business Act, which requires awarded prime contracts that offer subcontracting possibilities by the Federal Government in excess of $500,000, or in excess of $1,000,000 for construction of a public facility, include a subcontracting plan to the appropriate contracting agency. 15 U.S.C.§637(d)(4)-(6); F.A.R. 19.708(b). A number of responsibilities are placed on prime contractors, including prime contractor SBCs, to make subcontracting opportunities available to SBCs. Except for HUBZone contractors, who must be certified by the SBA[25], Contractors are entitled to rely on the written representations of subcontractors that they are SBCs, SDBs, VOSBs, SDVOSBs, SBCs owned and controlled by women, and SBCs owned and controlled by socially and economically disadvantaged people.

8(a) Business Development Program

Generally

One of the federal government's primary programs designed to assist small disadvantaged businesses is commonly referred to as the "8(a)" program.[26] The SBA's 8(a) Business Development Program is a more competitive program than general SDB certification.[27] An 8(a) must meet SDB requirements *and* have been in operation for at least two years *and* be owned by an individual with net worth of less than $250,000. The 8(a) program goal is to teach SDBs how to compete in the federal contracting arena and, importantly, how to obtain greater subcontracting opportunities available from larger firms as the result of business development, including mentoring, teaming, and joint venturing. As of October 2008, there were 9,545 companies participating in the SBA's 8(a) program.[28]

To meet the requirements for 8(a) business development status, a business must be "… a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States, and which demonstrates potential for success."[29]

Participation in the 8(a) program lasts for a total of nine years, four of which are the "developmental" phase and five are the "transitional" phase. In the *developmental phase*, the 8(a) firm receives the following assistance from the SBA:

- sole source and competitive 8(a) contract support;
- financial assistance;
- the transfer of technology or surplus property owned by the United States;
- training to aid in developing business principles and strategies to enhance its ability to compete successfully for both 8(a) and non-8(a) contracts.[30]

Additional assistance during the *transitional phase* includes "assistance from procuring agencies (in cooperation with SBA) in forming joint ventures, leader-follower arrangements, and teaming agreements between the concern and other Participants or other business concerns with respect to contracting opportunities outside the …program …" [31]

Contracts are awarded to 8(a) firms as sole source awards or those won through competition with other 8(a) companies. Misrepresenting the status of a company as a "small business concern owned and controlled by socially and economically disadvantaged individuals'' in order to obtain any 8(a) contracting opportunities is subject to criminal, civil and administrative penalties, including those discussed earlier.

Under SBA regulations, an 8(a) contractor is limited in the amount of work it can subcontract to others. In the case of a contract for general construction, an 8(a) firm must perform at least *15 percent* of the cost of the contract with its own employees (not including the costs of materials). In the case of a contract for special trade construction, the 8(a) contractor must perform at least *25 percent* of the cost of the contract with its own employees (not including the cost of materials).[32]

As the stated mission of the SBA's 8(a) Business Development (BD) Program is to "provide participating businesses with managerial, technical and procurement assistance to assist them in achieving their full competitive potential," the nine-year program strives to so provide participants with managerial and technical assistance and facilitation of sole source and limited competition contracts. Participants are assigned a Business Opportunity Specialist (BOS) in their District Office, who offers guidance in the following areas: developing and maintaining business plans; seeking loans; financial counseling; accounting and bookkeeping; marketing; management practices; equity and debt financing; obtaining surety bonds. According to the SBA's Standard Operating Procedures,[33] the BOS' "ongoing responsibility is to assist the participant in developing its business to the fullest extent possible so that it attains competitive viability during its program participation term and maintains viability thereafter."[34]

Orientation and Business Plan

Upon acceptance into the 8(a) program, participants are required to attend an orientation session, provide all required financial documentation and prepare a business plan. This business plan must be submitted within a 30-day time period and the SBA must approve it before any 8(a) contracts can be awarded. The participant's plan must address: the services it provides; its primary NAICS code and any related NAICS codes; its business targets and objectives; an analysis of market potential, competitive environment and prospects for profitable operations during and after participation in the program; an analysis of strengths and weaknesses; short-term, specific targets, objectives and goals for business development; and estimates of both 8(a) and non 8(a) contract awards that will be needed to meet these targets, objectives and goals. Once this business plan is reviewed and approved, it will form the basis of subsequent evaluations for the contractor.

Financial Review

At the end of each program year, the contractor undergoes a "financial review" and an "annual review" to maintain its eligibility. The SBA uses support levels as a planning and development tool to help firms determine the optimal number and dollar amount of 8(a) contracts to maximize their growth and development, without becoming unduly dependent on 8(a) awards.[35]

As part of the financial review, participants are required to submit an annual financial statement, including all notes, attachments and supplements, according to the following guidelines:

- Firms with revenues in excess of $5 million are required to provide a CPA-prepared audited financial statement within 120 days of fiscal year-end.
- Firms with revenues between $1 million and $5 million are required to provide a CPA-prepared review within 90 days of their fiscal year-end. Both of these statements must be prepared according to Generally Accepted Accounting Principles.
- Those firms with revenues below $1 million must submit an annual statement either prepared in-house or a compilation, verified by an authorized officer of the firm as to accuracy within 90 days of year-end.

The financial review is used to confirm that the firm is still a small business according to size standards; whether there is financial information showing that the firm is affiliated with a non-disadvantaged firm so that it is no longer small; whether there have been excessive withdrawals; that the financial information is consistent with the firm's annual

report of contracting activity; whether the firm has substantially achieved its goals; and whether the firm has met its business mix requirements.[36]

Annual Review

The annual review is comprehensive and addresses a number of topics. One of the main components is the Performance Trend Indicators, used to determine if the participant is making economic progress. The analysis looks at: (1) the total assets, (2) current ratio, (3) debt/net worth ratio, (4) net worth, (5) net sales, (6) pretax profit, and (7) sales/working capital ratio for the initial year and each subsequent year. These indicators are measured against industry means for non-disadvantaged firms of similar size in the same primary NAICS code. If an 8(a) participant exceeds the industry average in four of these seven categories, they will be informed that they could be subject to early graduation proceedings if they exceed four of the seven categories in the succeeding program year.[37]

Annual compensation data for owners, officers, directors or affiliates—this includes any loans, advances, salaries and dividends is also covered in the annual review. Participants are required to provide updated personal financial statements for each disadvantaged individual upon whom the certification is based. To be eligible for certification into the program, the disadvantaged individuals cannot have an adjusted personal net worth greater than $250,000. Following acceptance, if the adjusted personal net worth exceeds $750,000, the individual is no longer considered economically disadvantaged. Withdrawals (officer's salary, cash dividends, distributions in excess of amounts needed to pay S Corp taxes, cash and property withdrawals, bonuses, loans, advances, payments to immediate family members, investments on behalf of an owner, officer or key employee, acquisition of a business not merged with the participant, charitable contributions and speculative ventures[38] are monitored closely. If there appears to have been any excessive withdrawals of funds or other business assets, this may be grounds for termination or early graduation from the program. As an example, for any participant with annual sales over $2,000,000, withdrawals cannot exceed $300,000 for each individual upon whom eligibility is based.

Another major aspect of the annual review by SBA is the achievement of Business Activity Targets (BATs). As addressed earlier, there are two phases in the 8(a) program—the first four years are the "developmental" phase and the remaining five years constitute the "transitional" phase. During the transitional stage, participants are required to acquire increasing percentages of non-8(a) contracts relative to their total volume. In year 1 of the transitional stage (or total program year 5), an 8(a) contractor must successfully secure 15% of its volume from non-8(a) sources. This requirement increases by 10% each year, until in the final year (or total program year 9), participants must demonstrate that 55% of their revenues are attributable to non-8(a) sources. For obvious reasons, the SBA wants to ensure that, upon graduation, participants can successfully compete in the open market. If during the annual review, a participant is found to be out of compliance with its business mix requirement for that year, remedial actions will be taken. This can include the participant being ineligible for sole source 8(a) contracts in the current program year until it can demonstrate that it is back in compliance. If a participant makes no effort to obtain non-8(a) contracts, it can be recommended for program termination.

Exiting the 8(a) Program

There are five ways for a participant to exit the 8(a) program—term completion, graduation, voluntary withdrawal, early graduation or termination. Once a participant leaves the program for any reason, it is no longer eligible to receive 8(a) program assistance, including the award of 8(a) contracts.[39] That said, participants remain obligated to complete any previously awarded 8(a) contracts, including any price increases or scope modifications exercised under existing contracts. The SBA will continue to provide contractual assistance on any active 8(a) contracts.

Competitive and Sole Source Awards

The SBA uses sole source and competitive 8(a) requirements as a means of supporting the business development and growth of participants during their nine-year program terms.[40] This is accomplished by the SBA partnering with procuring agencies by either delegating its 8(a) contracting authority to these procuring agencies via a Partnership Agreement or acting as the prime and subcontract to an 8(a) participant. Admission into the program does not guarantee a participant award of 8(a) contracts, nor does it guarantee any particular level of contract support.[41] With sole source procurement, the procuring agency can either nominate a participant to whom it wants to award or the

SBA can match a participant to the contract. Sole source awards are limited to contract values of $3,000,000 or less for all contracts other than manufacturing, which is limited to $5,000,000 or less. Further, there must be a reasonable expectation that only one eligible participant will submit a fair market price offer. If these criteria are not met the 8(a) contract must be awarded competitively. For participants that have a revenue-based primary NAICS code, the 8(a) contract dollar limit above which it can no longer receive sole source 8(a) contracts is five times the annual receipts size standard corresponding to the NAICS code or $100,000,000, whichever is less. Both competitive and sole source contracts are counted in determining whether dollar limits have been reached.[42] Once the 8(a) contract limit is reached, a participant may not receive any more sole source contracts, but it remains eligible for competitive 8(a) awards.[43]

Geographical Considerations

Whenever possible, awards should be made to participants with a "bona fide place of business" within the geographical boundary of the work. This term is defined as a location where a participant regularly maintains an office that employs at least one full-time individual within the appropriate geographical boundary (construction trailers or temporary sites do not count). The District Office will make eligibility determinations—but eligibility includes bona fide place of business status for the purposes of competitive and open sole source construction awards. If a procuring agency nominates a participant for a sole source award, the geographical boundary restriction may not apply, assuming the participant is otherwise eligible.

Subcontracting

Due to the self performance requirements, the SBA must give its approval before any performance on an 8(a) contract is subcontracted to another concern. The SBA will not approve a proposed subcontracting arrangement if:

- the performance of work requirements would not be met;
- the proposed subcontractor has been suspended, debarred or is otherwise ineligible for federal work;
- the SBA determines that the proposed subcontractor would control the performance of the contract;
- the SBA determines that the proposed subcontracting relationship is not an arms length agreement; or
- the SBA determines that the proposed subcontracting arrangement is an attempt to circumvent SBA's size regulations.[44]

If any of the above-listed requirements are not met the SBA will not approve proposed subcontractors or arrangements.

Ownership

There are ownership restrictions for the participant firms. For the 8(a) program, neither the disadvantaged individuals (or their immediate family members), in the aggregate, nor the participant firm, can own more than 20% of any other single 8(a) participant. If a non-disadvantaged individual (in the aggregate with members of his or her immediate family) or firm that is not a program participant owns 10% or more of the participant firm, this individual (and immediate family) or firm cannot also own 10% or more of another program participant in the developmental stage or 20% or more of a current program participant in the transitional stage. Further, if a non-disadvantaged individual or a firm that is not a program participant operates in the same or similar line of business as the participant firm, that individual or firm cannot own more than 10% of the participant. This increases to 20% after the participant reaches the transitional stage. The exception to this rule is that a former program participant or the principals of a former program participant (unless terminated) in the same or similar line of business may own up to 20% of a participant firm during the developmental stage and up to 30% after the firm reaches the transitional stage.[45]

Affiliation

The SBA must establish that applicant firms are small businesses and that they continue to qualify as small businesses throughout their program term in 8(a). They do this based on the applicant's primary NAICS code and the corresponding size standard for this NAICS code in the size regulations.[46] As a reference point, the size standard for NAICS codes relating to general construction is $33,500,000 and $14,000,000 for special trades. The SBA examines

the firm's annual revenues or number of employees to determine if the firm fits within the size standard—if so, they qualify as small. The SBA must also look to see if there are any potential issues involving affiliation. This issue arises when the applicant firm either controls another firm or is controlled by another firm (i.e., one firm is a subsidiary of the other). Affiliation also arises where one individual has the power to control both the applicant firm and another firm (i.e., the same individual owns and operates two businesses, one of which is seeking to participate in the 8(a) program). There may also be identical or substantially identical business or economic interests (i.e., family members, persons with common investments or firms which are economically dependent through contractual or other relationships).[47] The SBA will also consider factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships in determining whether affiliation exists.[48]

As 8(a) contractors are encouraged to work with other contractors, Part 124-8(a) of the Code of Federal Regulations also sets forth the provisions for the interaction of "non-disadvantaged" individuals or entities with 8(a) participants. These provisions are important since an 8(a) firm must retain ownership and control of its business.

> (g) Non-disadvantaged individuals or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:
>
> (1) In circumstances where an applicant or Participant seeks to establish disadvantaged control of the Board of Directors through paragraph (d)(2) of this section*, non-disadvantaged individuals control the Board of Directors of the applicant or Participant, either directly through majority voting membership, or indirectly, where the by-laws allow non-disadvantaged individuals effectively to prevent a quorum or block actions proposed by the disadvantaged individuals.*
>
> (2) A non-disadvantaged individual or entity, having an equity interest in the applicant or participant*, provides critical financial or bonding support or a critical license to the applicant or Participant which directly or indirectly allows the non-disadvantaged individual significantly to influence business decisions of the Participant.*
>
> *(3)* A non-disadvantaged individual or entity controls the applicant or Participant or an individual disadvantaged owner *through loan arrangements.* Providing a loan guaranty on commercially reasonable terms does not, by itself, give a non-disadvantaged individual or entity the power to control a firm.
>
> *(4)* Business relationships exist with non-disadvantaged individuals or entities *which cause such dependence* that the applicant or Participant cannot exercise independent business judgment without great economic risk.

13 C.F.R. §124.106 (emphasis added).

JV/Mentor-Protégé/Teaming Considerations

With regard to 8(a) contractors joint ventures will be permitted by the SBA only when:

- the 8(a) firm lacks the capacity to perform the contract on its own;
- the joint venture arrangement is fair and equitable;
- the joint venture will be of substantial benefit to the 8(a) firm;
- the 8(a) firm brings substantial resources and/or expertise to the joint venture.[49]

An 8(a) participant must be designated as the managing, or lead, venturer and an employee of the 8(a) firm must serve as the project manager responsible for performance of the contract. For all joint ventures (except for Mentor/Protégé JVs), for all sole source and competitive 8(a) procurements that are *equal to or less than* one half the size standard of the NAICS code assigned to the contract, the 8(a) firm is considered to be affiliated for size purposes with the other firm and the combined revenues of all firms in the joint venture must not exceed the size standard for that NAICS code. For a competitive 8(a) procurement that *exceeds* half the size standard of the assigned revenue-based NAICS code, a joint venture of at least one 8(a) participant and one or more other business concerns may submit an offer as a small business as long as each concern is considered small under the size standard corresponding to the NAICS code assigned to the contract.[50] The 8(a) firm must notify and request approval for any contemplated agreements, understandings or arrangements of any type that might in any way give interest to any person, other than those upon whom eligibility is based, in the operation, management or control of the 8(a) firm, including joint

ventures. The joint venture agreement must be approved by the SBA prior to the award of an 8(a) contract to the joint venture.[51]

While the SBA is looking to expand the Mentor/Protégé Program to include the HUBZone set-aside program and the SDVOSB set-aside program,[52] it was established solely for the 8(a) program and is probably most widely utilized by 8(a) firms. There are benefits to the Mentor/Protégé relationship. The two firms approved by the SBA to be a mentor and protégé may joint venture as a small business for any government procurement. Provided that the protégé qualifies as small, *the mentor need not be a small business.* The mentor may own an equity interest up to 40% in the protégé. A determination of affiliation or control cannot be found between a mentor and protégé based solely on the Mentor/Protégé Agreement or any assistance provided pursuant to the agreement.[53] The mentor and protégé must execute a formal agreement, which must be approved by the SBA. Generally, the agreement must contain the following:

- an assessment of the protégé's needs;
- a developmental plan specifying what assistance the mentor will provide to address those needs—i.e. financial assistance in the form of equity investments or loans, assistance with accounting, management, technical areas, subcontracting, marketing, business planning, technology, human resources, participation in joint ventures;
- a provision that the relationship will continue for a minimum of one year;
- a provision that either can terminate the agreement with 30 days notice to the other and the SBA;
- a provision that the agreement cannot be changed without SBA approval.[54]

The SBA will not approve a Mentor/Protégé Agreement when:

- the developmental gains are not tied to the firm's approved business development plan;
- the assistance proposed by the mentor is not sufficient to promote any significant developmental gains to the protégé;
- the agreement is just a mechanism to enable a non-8(a) participant to receive 8(a) contracts; or
- the agreement poses issues of negative control.[55]

The relationships are reviewed annually and must be reapproved by the SBA each year.

In order to maximize the number and type of procurement opportunities for 8(a) firms, they are both allowed and encouraged to team with both 8(a) and non-8(a) firms.[56] Generally speaking, a teaming arrangement may be an arrangement in which a potential prime contractor agrees with one or more companies to have them act as its subcontractor(s) or to participate as a joint venturer under a specified government contract or acquisition program. The requirements for self performance must be maintained. Of note, the SBA is not normally involved with these arrangements and the SBA is not required to review or approve them. While a teaming arrangement may be a helpful business development tool for 8(a) contractors, it may affect a participant's eligibility if it results in circumstances of actual or negative control, affiliation or loss of small business status.[57] Therefore, the parties involved should carefully review the proposed teaming arrangement to determine the relationship of the parties.

Legal Precedent

Many of the cases involving 8(a) contractors deal with the "control" issue, which is addressed more fully later in this paper, or address constitutionality issues, which are beyond the scope of this paper.[58] A sampling of some other 8(a) decisions follow:

- The SBA's Office of Hearings and Appeals ("OHA") has consistently held that 8(a) regulations will not be applied to procurements outside of the 8(a) program and that SBA has an affirmative duty to enforce the 8(a) regulations within the 8(a) program. *See, e.g.*, In the Matter of Fairfield Trucking, Inc., BDP-223 (2005)(SBA's failure to do so was found a breach of the public trust).
- The SBA can arrange for the performance of prime contracts by negotiating *or* otherwise letting subcontracts. In other words, the SBA is authorized to award 8(a) contracts without competition. Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir.1973), *rehearing denied.*

- Making the procurement an 8(a) set-aside can be challenged by non-8(a) firms who believe they are injured (i.e. lack of opportunity to compete on equal footing) by an improper set-aside. *Dynalantic Corp. v. DOD*, 115 F.3d 1012 (D.C.Cir.1997); *see also* *Laforge & Budd Construction Co., Inc. v. U.S. Army Corps of Engineers*, 42 F.C.R. 952 (1984).
- False statements made by an 8(a) contractor in order to hide prohibited contract arrangements it had with a non-minority contractor, subjected it to liability under the False Claims Act. *Ab-Tech Construction, Inc. v. U.S.*, 31 Fed.Cl. 429 (1994).
- Financial support by a non-disadvantaged shareholder in an 8(a) participant firm, even if critical to that 8(a) firm, does not, by itself, constitute control. *See, e.g.*, *In the Matter of LDV, Inc.*, BDP-252 (2007).
- When an 8(a) participant fails to provide the necessary paperwork required by 13 C.F.R. §124.112(b), 124.602, then the participant can be terminated from the 8(a) program. *In the Matter of Fairfield Trucking Company*, BDP-223 (2005).

Service Disabled Veteran Owned Small Business Concern (SDVOSB)

Generally

The newest federal contracting procurement program is that involving Service-Disabled Veteran-Owned Small Businesses ("SDVOSB"). While fostering the participation of Veteran-Owned Small Businesses ("VOSB") has been supported for a number of years, a specific procurement assistance program for SDVOSBs is relatively new. A SDVOSB is a small business concern that is at least 51% owned by one or more Service-Disabled Veterans (S-DV) (or, if a publicly-owned business, 51% of stock held by one or more S-DV), and whose management and daily business operations are controlled by one or more S-DV (or the spouse or caregiver if the veteran has a permanent and severe disability). In 2003, Congress created a procurement program specifically to provide contracting assistance to SDVOSBs.[59] All federal agencies are to participate and achieve a 3% participation goal of the total value of all prime contract and subcontract awards for each fiscal year.[60] Similar to the self-certification of 8(a) firms[61], a SDVOSB "self-certifies" its status under this program. In the event of a protest, the SDVOSB must be able to produce an adjudication letter from the Veterans Administration or a DOD Form 214 (certificate of release or discharge from active duty).

The federal regulations require that a S-DV hold the highest officer position in the company (usually President or CEO) and have managerial experience needed to run the company. It is not necessary, however, that the manager have the technical expertise or the required license(s) to be found to control the SDVOSB *if* it can be demonstrated that the person so designated has the ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.[62] The SDVOSB must fall within the size requirements of the NAICS code assigned to the contract. *See* 13 C.F.R.§121 for small business size regulations. If an SDVOSB has an affiliate, it too must fall within the "small" size requirements contained in 13 C.F.R.§ 121. The criminal violations discussed on page 2 apply equally to misrepresentations as to the status of the SDVOSB.

Recognizing the sacrifice of servicemen and women, in 1974 Congress put a legislative framework in place to assist service-disabled veterans in federal contracting. Despite good intentions, this was ineffective because no further significant legislation was passed to assist them with entry in to the federal acquisition field until 1999, when the Veterans Entrepreneurship and Small Business Development Act ("VESBD Act") was passed. The VESBD Act established a goal for all federal agencies to award no less than 3% of all contracts annually to small business concerns owned and operated by service-disabled veterans. This, too, was largely ignored in the years immediately following its enactment, because agency officials asserted that they lacked an effective means by which to implement the law.[63]

In 2003, Congress passed the Veterans Benefit Act, which not only restated the original intent to award 3% of all government contracts to SDVOSBs, but also authorized contracting officers to conduct competitive contract set-asides and sole source procurements. When federal agencies still failed to achieve this 3% goal, President Bush issued Executive Order 13360 on October 20, 2004, providing much-needed direction and a clear mandate to the heads of federal agencies. The order outlined the respective roles for the Administrators of the SBA and the GSA, the Secretary of Defense, the Secretary of Veterans Affairs and the Secretary of Labor. It also directed all federal agency heads to develop a "strategic plan" and designate a senior-level official who would be responsible for implementing

the agency's strategy. While this executive order was successful in providing an increased number of contracts awarded to SDVOSBs, the growth rate remained sluggish at best, prompting further Congressional action. In December 2006, Congress passed the Veterans Benefit, Health Care and Information Technology Act ("VBHCIT Act"). The VBHCIT Act enabled a "veterans first" approach to contracting specifically within the Department of Veterans Affairs. Under this Act, the DVA is authorized to provide a preference to both VOSBs and SDVOSBs, including veteran and service-disabled veteran small business status as an evaluation factor in competitively negotiated solicitations.

Recent Trends

The Department of Veterans Affairs estimates that approximately three million American veterans own their own businesses. The VA asserts that its special mission is to act as an advocate in commercial and federal markets and ensure it meets certain goals in purchasing from veteran-owned small businesses. The DVA's objectives are two-fold:

- to help other federal agencies reach their required procurement target of 3%; and
- to achieve its self-imposed target of 7% of purchasing from SDVOSBs and 10% for veteran-owned businesses.

As part of the DVA's services, it created a Center for Veterans Enterprise, which participates in small business conferences to inform veterans on ways to maximize federal contracting opportunities.

The VESBD Act in 1999, called for the creation of the National Veterans Business Development Corporation, a non-profit, quasi-governmental organization whose mission was: to identify and unite veteran-owned businesses; promote to industries the advantages of doing business with S-DVs; advocate and strengthen veteran-owned businesses through lobbying efforts at the state and federal level; and provide veterans with guidance on developing and growing small businesses. This organization is now called The Veterans Corporation ("TVC").[64] Among other resources listed on the TVC website, there is a page devoted to TVC's "Access to Bonding Program." Through a partnership with the Surety & Fidelity Association of America ("SFAA"), the TVC has an online bonding questionnaire and surety preparedness checklist to help veteran contractors obtain bonds. According to the TVC website, the TVC and SFAA will identify a knowledgeable surety bond producer who can review the company and help find a CPA to review financial statements and assess financial capacity. Contractors can decide to enter TVC's Surety Bonding Program and gain SFAA as a strategic resource.

Qualifications

In the Frequently Asked Questions section of the Department of Defense's Veteran-Owned Small Business page, the DOD asserts that:

> For a veteran who suffers service-connected disability, our Government has deemed it our moral obligation to provide the disabled veteran a range of benefits designed to ease the economic and other losses and disadvantages incurred as a consequence of serving his or her country. These benefits include Government assistance for entering the Federal procurement marketplace.

Generally, a S-DV is a person who served in active military, naval or air service and who was discharged or released under conditions other than dishonorable and whose disability was incurred or aggravated in the line of duty. There is no minimum disability rating to self-represent as a S-DV—a veteran with a 0 to 100% disability rating is eligible for federal contracting purposes. SDVOSBs self-certify their service-disabled status; however, the SBA may verify the eligibility of any SDVOSB in the case of a protest.

Competitive and Sole Source Awards

As with the 8(a) program, agency contracting officers are authorized to conduct competitive contract set-asides and sole source procurements exclusively for SDVOSBs. For construction, the contracting officer can award a sole source contract if the anticipated award price, including options, will not exceed $3,000,000, the contractor is responsible and able to perform the contract, the contract can be awarded at a fair and reasonable price and only one eligible contractor will submit an offer. Under Executive Order 13360, the designated senior agency official tasked with monitoring strategic plan compliance must encourage contracting officers to use contract set-asides and sole source

procurements wherever appropriate. Further, these officials should be ensuring that agency subcontracting plans are developed and closely monitored to encourage prime contractors to subcontract with SDVOSBs.

Subcontracting and Joint Ventures

In terms of subcontracting, the SDVOSB firm must spend at least 15% of the cost of contract performance incurred for personnel on their own employees or the employees of other service-disabled veteran-owned businesses for general construction and 25% for special trade construction. A SDVOSB may joint venture on a set-aside contract, provided that for a sole source or competitive procurement that is half the size standard corresponding to the NAICS code assigned to the contract, the firms will be considered to be affiliated for size purposes and combined cannot exceed the size standard for that NAICS code. If the contract exceeds half the size standard for that NAICS code, then each of the firms involved must individually qualify as small businesses. According to the SBA regulations, every joint venture agreement must contain provisions:

- setting forth the purpose of the joint venture;
- designating a SDVOSB as the managing venturer and an employee of the managing venturer as the project manager responsible for performance of the contract;
- stating that not less than 51% of the net profits earned by the JV will be distributed to the SDVOSB;
- specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the contract;
- obligating all parties to ensure performance and completion of the contract despite the withdrawal of any member; and
- requiring final original records be retained by the managing venturer upon completion.

Further Considerations

Similar to the 8(a) program, the establishment of a sole source and set-aside procurement vehicle is designed to attract more entities to the Federal procurement arena. The expectation is that this will result in the formation of new small businesses. While the 8(a) program has a general two-year in business rule, there is no similar regulation for SDVOSBs. Further, the 8(a) program has very highly defined structure to the program and how it is administered—specifically, with business plan requirements, annual certification requirements, financial reporting requirements and business mix requirements, etc. – which does not appear present in the SDVOSB program. As long as the eligibility requirements are maintained, participation in the SDVOSB program is indefinite.

There are other noteworthy distinctions between the 8(a) program and the SDVOSB program:

- There does not appear to be the same geographical guidelines under SDVOSB program as under the 8(a) program for letting contracts.
- There does not appear to be a limitation on the aggregate dollar amount of work that can be awarded sole source to any one SDVOSB—which does exist in the 8(a) program. This is likely a function of the definite term of the 8(a) program.
- The S-DV must hold the highest officer position in the company, but need not have technical expertise.
- Other than having revenue documentation available in the case of a size protest, SDVOSBs are not required to produce any specific level of financial reporting in order to participate in the program. There are no regulations for SDVOSBs regarding excessive withdrawals or personal net worth limitations, as there are in the 8(a) program.
- 8(a) contractors are required to prepare an initial business plan and regularly update and maintain it over their nine-year tenure in the program. *This level of oversight is not provided for SDVOSBs*.

Legal Precedent

Ownership and control are critical determining factors in the eligibility of SDVOSBs for the program. If either one is lacking, then the regulatory requirements for SDVOSB status have not been met. With respect to *ownership*, "[t]he regulatory mandate is clear and unequivocal; a S-DV's ownership of an SDVOSB must be *unconditional and direct*."[65] In the case of an entity organized as a limited liability company, 51% of each class of each member must be

unconditionally owned by a service-disabled veteran. Thus, when two entities form a limited liability company a SDVOSB is not created, even where one of entities is owned by a S-DV.[66] In other words, while the S-DV owned an entity, he did not *directly* own the limited liability company.

The requirements to establish *control* are set forth in 13 C.F.R. §125.10. Basically, both the long-term decision-making and the day-to-day management and administration of the business must be controlled by a service-disabled veteran.[67] In addition, if the S-DV is not residing or located in where the work is being performed, it is likely that the control requirement will not be satisfied.[68] For a limited liability company, a service-disabled veteran must be a managing member with control over all decisions of the LLC. [69]

For a corporation, the SBA will examine whether the S-DV controls the Board of Directors by owning 51% of stock, having a seat on the board and sufficient stock for super-majority voting requirements *or* by having a majority of service-disabled veterans on the board.[70]

The SBA will look to the managerial experience of the S-DV to see if he or she has control over the long-term decision-making and the day-to-day management. In *In the Matter of Teamus Construction Co., Inc.*,[71] the OHA stated that the SBA "must go beyond the formalities of business ownership and titles and [to] examine how the applicant concern is actually run on a daily basis." In *Teamus*, the S-DV held the highest officer position in the construction company, but actually ran a restaurant business 86 miles away from the location of the construction company and had little to no construction management experience.[72] As other cases have, this 2009 case also emphasized that while other contracts and businesses may not require day-to-day supervision, a construction contract does, and on-site interaction and supervision of trades is paramount and cannot be done by telephone or email.[73]

HUBZone Program

Generally

The federal contracting program known as the Historically Underutilized Business Zone Program ("HUBZone") was created in 1997, is administered by the SBA, and is set forth at 15 U.S.C. §657a. It provides federal contracting assistance for small business concerns operating in certain urban and rural communities in order to increase employment opportunities, investment, and economic development in such areas, through the establishment of preferences. The HUBZone Program has been enhanced through amendments to the 1998 final rule, with the most recent amendments effective on June 23, 2004. In order for a firm to be eligible to qualify as a HUBZone-certified small business, they must meet certain criteria, including:

- **Ownership**—the concern must be at least 51% unconditionally and directly owned and controlled by persons who are United States citizens, a Community Development Corporation, an Indian tribe, an Alaska Native Corporation or a small agricultural cooperative.
- **Principal Office**—the concern must maintain a principal office located in a HUBZone. Principal office is defined as the place where the greatest number of the concern's employees at any one location performs their work. For construction companies, determination of principal office excludes those employees who perform the majority of their work at job-site locations to fulfill specific contract obligations.
- **Employees**—a minimum of 35% of the concern's employees must reside in a HUBZone. The employees do not need to live and work in the same HUBZone.
- **Contract Performance**—the concern must represent that it will "attempt to maintain" the 35% employee HUBZone residence requirement during the performance of any HUBZone contracts it receives. According to the SBA regulations, "attempt to maintain" is defined as "making substantive and documented efforts such as written offers of employment, published advertisements seeking employees and attendance at job fairs."
- **Size**—the concern, along with any of its affiliates, must meet the size standard corresponding to its primary NAICS code to qualify as a small business.[74]

A "HUBZone" is determined by SBA through a compilation of data (which can change periodically[75]) and may be one of the following locations: a qualified census tract; a difficult development area (only applies to AK, HI, and U.S. territories and possessions); a qualified county; a qualified Indian reservation; or a former military base closed by BRAC.

SBA Responsibilities

All federal agencies have a participation goal of 3% annually on prime contracts for HUBZone small businesses. The HUBZone Program is also administered by the SBA, which is responsible for certifying eligible firms as qualified HUBZone small business concerns—an important distinction from both the 8(a) Program and the SDVOSB Program, where companies self-certify. According to the SBA's HUBZone Program Standard Operating Procedures[76], the SBA is also responsible for:

- publication of a listing of HUBZone-certified firms for use by acquisition agencies and other interested parties;
- conducting program examinations on certified firms; adjudication of eligibility status protests and appeals;
- decertifying firms no longer meeting eligibility requirements;
- conducting marketing and outreach to acquisition, economic development and small business communities; and
- reporting of program activity and achievement.[77]

Benefits to Certification

If a firm meets the criteria for eligibility, they can apply to the SBA for acceptance into the program and certification as a qualified HUBZone. There are numerous benefits to obtaining this designation, but the most important are the following Federal procurement preferences:

- application of a 10% price evaluation preference in full and open competition for contracts above the simplified acquisition threshold (i.e., the price offered by a HUBZone firm will be deemed lower than the price offered by the lowest, responsive large business offeror, as long as the HUBZone's price is not more than 10% higher);
- award of contracts set-aside for competition among HUBZone-certified firms;
- negotiation of sole source contracts up to $3 million for construction;
- subcontracting opportunities on construction contracts exceeding $1 million, as they must include, to the extent practicable, subcontracting plans for HUBZone-certified firms. [78]

Procedures for Certification

As part of the 1997 law that created the HUBZone Program, the SBA was required to establish procedures for verifying eligibility of certified firms, and the procedures could include random program examinations. Program Examinations are a comprehensive audit of a firm to ensure compliance with all program requirements. Factors that could prompt a firm to be selected for a Program Examination include: random selection; notice of a material change in eligibility submitted by a certified HUBZone concern; and receipt of 'credible evidence' by the SBA calling into question the HUBZone status of a small business concern.[79]

Once a firm is selected for a Program Examination, the HUBZone liaison within the respective SBA field office will notify the firm via email. The firm, in turn, must acknowledge receipt of the initial email notification within 10 calendar days and must complete the online examination form within 20 calendar days. A firm's failure to comply could result in decertification from the program.

In addition to the online form, HUBZone firms must provide information and/or documentation supporting its claim of continuing eligibility. Some examples of the type of documents required are as follows:

- organization charts and lists of owners, officers, directors, partners, managers;
- proof of US citizenship for the owners showing that at least 51% of the company is unconditionally and directly owned and controlled by US citizens;
- lease, rental agreements or property tax records for the principal office;
- payroll records to evaluate compliance with the 35% HUBZone employee residence requirement;
- three most recent IRS federal tax returns;

- list of HUBZone contracts identifying procuring agency, date of bid submission, date of contract award, total dollar amount and HUBZone methodology used in awarding the contract (sole source, set-aside, price evaluation); or
- business formation documents.[80]

The HUBZone status of the firm will be automatically updated in the Central Contractor Registration upon completion of the Program Examination—showing either recertification or loss of HUBZone status. In a similar process, HUBZone firms are required to be "recertified" every three years to maintain their eligibility in the program. A firm may exit the program through a voluntary decertification at any time. Other ways for a firm to be decertified include failure to rebut a proposed decertification; as a result of the Director of HUBZone sustaining a status protest; through adverse inference arising from non-responsiveness. Firms that have been declined or decertified may seek certification again after one year if they can show they have overcome all the reasons for decertification and are currently eligible.

Geographical Considerations

According to SBA regulations, a qualified HUBZone small business may have offices or facilities in another HUBZone or even outside a HUBZone and still be qualified as long as its *principal office* is located in a HUBZone. This means that all the firm's locations can claim HUBZone status. Further, as already mentioned, the regulations were amended to allow qualified HUBZone firms to have affiliates as long as, when combined, the firm and all its affiliates still qualify as a small business under the applicable size standard. The removal of this restriction allows small businesses in non-HUBZone areas to establish new ventures in these HUBZones—which is really the point of the program in the first place—to bring investment capital into these areas to promote economic development and create jobs. Qualified firms can either be businesses currently located in a HUBZone, start-up businesses that choose to start operations in a HUBZone or existing small businesses that relocate to a HUBZone. Firms that already have other designations under other SBA programs—like 8(a) or SDVOSB—can be certified as qualified HUBZone businesses if they meet all of the requirements. Dual status can be beneficial, so firms that qualify for both designations are encouraged by the SBA to obtain them. The HUBZone Program was intended to add on to, not subtract from, other small business programs. The programs are not meant to compete against each other.[81]

Material Changes

Qualified HUBZone small businesses have an ongoing obligation to immediately notify the SBA of any material change that could affect its eligibility.[82] These include changes in ownership, business structure, principal office or failure to meet the 35% HUBZone employee residency requirement.[83] At the time of a bid submission on a HUBZone contract, a HUBZone firm must certify to the Contracting Officer that no material change in its circumstances has occurred since the date of certification shown on the SBA List of HUBZone firms that could affect its eligibility. The firm must also be qualified both at the time of its initial offer *and* at the time of award in order to be eligible for a HUBZone contract. Despite the fact that there might be a lengthy time between bid submission and award, the SBA believes that awarding a HUBZone contract to a concern that does not meet the requirements of the program provides no help to the HUBZone community or its residents.[84] Additionally, the firm must certify that, together with all of its affiliates, it is small under the applicable size standard for the contract. It must also represent to the Contracting Officer that it will "attempt to maintain" the required percentage of employees who are HUBZone residents during the performance of the HUBZone contract.

Subcontracting

A significant difference between some of the other SBA programs and HUBZone has to do with subcontracting restrictions. This issue is noteworthy in that a qualified HUBZone firm receiving a HUBZone contract for general or specialty construction must perform at least 50% of the contract either itself or through subcontracts with other qualified HUBZone small businesses. It does appear that they must also meet the minimum self-performance standards of 15% for general construction and 25% for specialty construction—the balance of 35% for general construction and 25% for specialty may be subcontracted to another qualified HUBZone firm. A contracting officer may waive this requirement for a particular procurement after determining that at least two qualified HUBZone firms cannot meet the requirement. Where a waiver is granted, the firm must meet the more typical SBA requirement outlined above of self-performing 15% for general construction and 25% for specialty trades.[85]

The SBA believes that this additional performance requirement for construction contracts is necessary because the HUBZone Program is intended to stimulate historically underutilized business zones through job creation and capital investment. If a qualified HUBZone firm is able to subcontract up to 85% of a general construction contract or up to 75% of a special trade contract to non-HUBZone small businesses or large businesses, the SBA is concerned that it would not be meeting the Congressional purpose of the program.[86] The SBA also believes that this rule will increase the number of subcontracts issued to HUBZone firms—which may, in turn, increase the number of contracts ultimately awarded to HUBZone firms, because more concerns will be gaining experience through subcontracting. The SBA's expectation is that, because of the number of qualified firms in the construction field, a prime HUBZone business should not have a problem subcontracting to another HUBZone firm to meet this requirement.[87]

Joint Ventures

Along the same lines, there are additional restrictions for joint ventures in the HUBZone program. A joint venture may submit an offer on a HUBZone contract only if it meets all of the following requirements:

- both participants must be qualified HUBZone small business concerns;
- the two firms, in the aggregate, must qualify as small under the applicable size standard for the contract if the procurement itself is less than half the size standard;
- each of the firms must qualify as small independently if the procurement exceeds half of the applicable size standard;
- the aggregate of the joint venture (not each concern separately) must perform the applicable percentage of work required for subcontracting.[88]

According to the SBA, this regulation is to protect the HUBZone program from becoming a tool for unqualified firms to use a "front" to get HUBZone benefits. The SBA believes that allowing HUBZone contracts to go to qualified firms that joint venture with a non-HUBZone small business concern will dilute the benefits intended to go to the HUBZone area and residents.[89]

Mentor-Protégé

The HUBZone Program of the SBA does not currently allow for participation in mentor/protégé relationships, although there has been discussion of expanding the Mentor-Protégé program to include HUBZones and SDVOSBs as protégés. Other federal agencies, such as DOD and NASA, specifically include HUBZones within their own agency Mentor-Protégé programs. For instance, DOD has a Mentor-Protégé program that seeks to encourage major DOD prime contractors to develop the skills – technical and business – of SDBs, including HUBZones and SDVOSBs. Information regarding the DOD Mentor-Protégé program can be found at http://www.acq.osd.mil/osbp/mentor_protege/index.htm.

Fraud

The HUBZone Program has been under heavy scrutiny by the Government Accountability Office ("GAO") and the House Small Business Committee for reports of fraud and abuse. The GAO conducted an investigation during the first half of 2008 and produced a report in July 2008 alleging identification of substantial vulnerabilities in the SBA's application and monitoring process that clearly demonstrate the program is vulnerable to fraud and abuse.[90] As part of its investigation, the GAO created four bogus small business firms and applied for HUBZone certification—in all four cases, the firms were certified with little to no verification of data or requests for supporting documentation. The GAO identified ten firms in the Washington, DC metro area that were participating in the HUBZone program even though they clearly did not meet eligibility requirements.[91] According to the GAO, since 2006, federal agencies have awarded more than $105 million in prime contracts to these ten firms. Of the ten firms, six did not meet both the principal office and employee residence requirements, while four met the principal office requirement but significantly failed the employee residence requirement.[92] During the application process, firms are required to agree to the statement that anyone failing to correct "continuing representations" shall be subject to fines, imprisonment and penalties. Firms are also required under the FAR to update the government's Online Representations and Certifications Application ("ORCA") as prospective contractors, which includes certifying whether the firm is currently a HUBZone firm and that

there have been no material changes in ownership, control, principal office or HUBZone employee percentage since it was certified by the SBA.[93] Given the GAO's findings that these firms were clearly not eligible for the program, but continued to represent themselves as certified participants, the GAO considered these representations as indicative of fraud and referred all ten to the SBA Inspector General for further investigation. [94]

In response to this July 2008 report, both the GAO and SBA Inspector General have conducted further investigations into abuse in the program across the country. With approximately $8 billion in HUBZone contract awards each year, this issue is garnering much attention. An article by the Associated Press dated March 25, 2009,[95] alleges that "because of lax oversight, undeserving companies collected millions in federal contracts from an $8 billion government program designated for small businesses in poor neighborhoods."[96] According to the article, GAO investigations revealed that business owners "freely admitted diverting lucrative work to large companies or ineligible businesses," with one owner going so far as to admit subcontracting 71-89% of work to large firms and other businesses, "explaining that large firms typically used HUBZone companies as 'contract vehicles.'"[97] The Chair of the House Small Business Committee, Rep. Nydia Velazquez, claims "dishonest companies see skirting the rules as 'business as usual'" and "this is a program that needs to be shut down."[98] The GAO reports that the "Small Business Administration repeatedly failed to verify paperwork and conduct audits to weed out sham firms claiming to have main offices in economically distressed areas."[99] In response to these reports, the SBA has said that it is currently "re-engineering the entire HUBZone process" and that it "generally agrees with the GAO's recommendations urging stronger checks, unannounced site visits and stiffer enforcement."[100]

Legal Precedent

According to a GAO decision HUBZone set-asides have priority over SDVOSBs.[101] In *Matter of International Program Group, Inc.*, a HUBZone small business protested the decision of the U.S. Marine Corps to issue two procurement contracts on a sole-source set-aside basis to a SDVOSB. While recognizing mandatory language regarding HUBZones[102], the GAO noted that, in contrast, SDVOSB statutory language was discretionary only.[103] The GAO then determined that, given the unambiguous mandatory language of HUBZone and the unambiguous discretionary language of SDVOSB, "the agency was required to reasonably consider whether a HUBZone set-aside was warranted before proceeding with the sole-source order to [contractor] under the SDVOSBC program."[104] The GAO reached this decision despite the SBA's comment, in response to the GAO's solicitation on this issue, that *it* interprets the statutes and regulations to provide for *parity* among the HUBZone, SDVOSB, and other small business programs. In March of 2008 a proposed FAR amendment was introduced to clarify this confusion on precedence among SBA contracting programs. The proposed rule is intended to reflect the Small Business Administration's interpretation of its regulations regarding the order of precedence.

LEGAL ISSUES INVOLVED IN "PARTNERING" WITH SMALL BUSINESSES

Generally

In September 2007, the Department of Defense published a "Guidebook for Facilitating Small Business Team Arrangements"[105] for the purpose of helping its acquisition team members (contracting officers) to encourage small businesses to form teams to compete for prime contracts. According to the DOD, "competition has fostered outsourcing of all but the core competencies of a firm. In this environment, teaming has become commonplace. Firms seek partner firms to provide commodities and services as needed."[106] Growth in size and complexity of government procurements has made teaming a necessity in the federal marketplace. One of the reasons for this growth is the increased utilization of contract consolidation, which is defined as the combining of two or more contracts into a single new solicitation. Shrinking budgets and reductions in the acquisition workforce mean that the practice of contract consolidation will likely continue for the foreseeable future, but is generating an increased number of contracts that are "out of reach" for small businesses.[107] Further to this point, multiple award contracts, multi-agency contracts and government-wide acquisition contracts "may result in contract consolidation and awards to teams composed of large contractors."[108] The DOD Guidebook informs contracting officers that federal contracts are "becoming more complex; larger in scope, size and dollar amount; and often geographically dispersed."[109] It reminds contracting officers that all agencies "remain charged with carrying out the principal tenet of the Small Business Act: provide the maximum practicable opportunity to small businesses."[110] In light of these potentially divergent trends,

agencies are increasingly looking to teaming among small businesses as a way to satisfy both their needs and their statutory obligations.

The SBA will examine the firms to determine whether they must be considered affiliates. According to the statutes and regulations governing SDBs, a non-disadvantaged business cannot "control" an SDB.[111] Courts will look at different factors to determine if a joint venture or teaming partner is "affiliated" with the SDB and, thus, whether the joint venture or teaming partner "controls" the SDB.

The SBA will determine affiliation in a variety of ways, some of which will be discussed here. These tests and rules include: the "ostensible subcontracting" rule; the "totality of the circumstances" test; the "identity of interest" rule; and, the "newly organized concern" rule. The SBA will also closely examine joint ventures, as well as stock ownership, common management, and merger agreements.[112] Even when finding affiliation, the ability to control is the vital issue. In addition to the CFR, case law in size appeals from the SBA's Office of Hearings and Appeals (OHA) provides guidance on what factors the SBA will consider in determining affiliation and control.

Affiliation Issues

Bonding Assistance

Bonding assistance, wherein a large business agrees to indemnify a bond provided on behalf of a small business, is examined closely in federal contracting assistance programs. OHA specifically looks closely to see if firms engaging in such a relationship are affiliated. OHA has consistently held that bonding assistance alone does not prove that a large firm and a small firm are affiliates,[113] but it can, support a finding of affiliation in connection with other indicia of affiliation. Where a smaller firm received bonding assistance from the larger firm *and* had a fifteen-year joint venture arrangement, which produced 40% of the smaller company's revenues, the smaller company was found to be an affiliate of the larger one.[114] The court also found that the smaller company was clearly dependent on the larger one for bonding.[115]

One legal commentator has opined that there are three factors which can demonstrate that bonding assistance is not a segue to affiliation, but instead a part of a legitimate business relationship:

- The large business does not have the exclusive right to provide bonding assistance to the small business;
- The small business pays the large business a fee for the bond indemnification; and
- The small business agrees to indemnify and hold harmless the large business from any losses suffered due to the bond indemnification.[116]

Ostensible Subcontracting

The "ostensible subcontractor rule" provides that "when a subcontractor is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, the two firms are found to be engaged in joint venture, and thus affiliated."[117] In other words, if it is found that the subcontract relationship is a sham or front for the "ostensible subcontractor" to control the small business prime, then affiliation will be found. The SBA will use a "Seven Factor" test to evaluate the prime/subcontractor relationship to see if an ostensible subcontractor relationship exists. If so, both the prime *and* the subcontractor will need to meet the applicable size standards in order to survive a size protest. The purpose of the rule is to prevent large contractors from evading the size regulations by forming relationships with small, disadvantaged contractors.

The "Seven Factor" test consists of the following considerations:

- Which party will manage the contract?
- Which party possesses the necessary background and expertise to carryout the contract?
- What party pursued the contract award?
- What degree of collaboration was there on the proposal effort?
- Were tasks allocated to be performed by each party or is there comingling of personnel and materials?
- What is the amount of work to be performed by each party?
- Which party will perform the more complex and costly contract functions?

If it can be determined that the subcontractor is performing a significant portion of the work or the prime cannot do the work independently, then an "ostensible subcontracting" relationship will be found to exist. Some illustrative cases on this issue are as follows:

- *Size Appeal of Taylor Consultants, Inc.*, SBA SIZ No-4775 (2006). Ostensible subcontracting was found when the prime contractor was "unusually reliant, in almost every particular, upon [subcontractor]."
- *Size Appeal of American Guard Services*, SBA No. SIZ- 4397 (2000). Ostensible subcontracting was found when the sub was to provide the necessary insurance, bonding, financing and management consulting. Further to this point, the firms were to share profits and each firm was handling different aspects of contract performance.
- *Size Appeal of Public Communications Services, Inc.*, SBA No. SIZ -5008 (2008). Ostensible subcontracting was not found as there was no undue reliance on the sub and the sub was not performing vital and primary tasks of the contract. The Court found that the facts "do[es] not fall into this abusive fact-pattern, as the proposed subcontractor, Unisys, is not the incumbent."
- *Size Appeal of TCE Incorporated*, SBA No. SIZ -5003 (2008). In this case, the factors involved in determining there was no ostensible subcontractor included: no previous affiliation between firms; no sharing of space or resources; no financial dependence; the prime contractor had performed on several contracts as prime; and, instant procurement was first time the firms had worked together.

Totality of the Circumstances

The "totality of the circumstances" test is yet another method to find affiliation. Totality of the circumstances means a court considers "whether the facts, taken together, show the [prime] and its putative affiliate are acting in such a manner as to trigger the intent and specific coverage of SBA's affiliation rules." [118] While a single indicia of affiliation is insufficient for an overall finding of affiliation under this test, "when the connecting relationships between firms so suggest dependence as to render them affiliated," then affiliation will be found.[119]

Newly Organized Concern

The SBA will also look closely at a newly organized concern to determine whether there is affiliation with a predecessor firm. Under the "newly organized concern" rule, two firms are deemed to be affiliated if:

- Former officers, directors, principal stockholders or key employees of one firm organize a new firm;
- These individuals then serve in those positions also at the new firm;
- The new firm is in the same or related industry as the old firm;
- The old firm furnishes or will furnish to the new firm contracts, financial, technical or bonding assistance.[120]

"A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns." 13 C.F.R. §121.103(g).

Illustrative cases on this issue newly organized concerns are:

- *Size Appeal of Field Support Services, Inc.*, SBA No.SIZ-4176 (1996). A new firm, Field Support, was formed in 1985, while its incorporator was still an officer at a large firm, Del-Jen. Even though Field Support did not receive its first contract until 1991, the OHA found an affiliation. Although age of the firm is not the determinative factor it is one factor to consider. The OHA looked at whether Del-Jen was providing Field Support with resources or was there a "clear line of fracture" Some of the factors that OHA found, which led to its conclusion that Field Support was dependent upon Del-Jen, were: bonding support (Del-Jen provided indemnification to the surety on behalf of Field Support); Field Support was founded by an officer and shareholder of Del-Jen; Del-Jen was a principal sub to Field Support on the procurement; Field Support had only a paper existence until 1991, when it obtained its first contract (and since had performed only two others); and the two firms were cooperating in recruiting personnel for the contract. Consideration of these factors led the OHA to conclude there was no clear line of fracture between the two firms and, in fact, they had "a close continuing relationship between them, in addition to the bonding".

- In *Size Appeal of Vortec Development, Inc.*, SBA No.SIZ-4866 (2007), an individual was held to be a "key employee" of her former firm where her title was Contract Administrator and there was only a 1% difference between her salary and that of the co-owner (her brother). As such, she was held to have had critical influence/substantial control over that firm's day-to-day operations. No "clear fracture" was found given that the parties admitted that, in their small town, they were bound to have a business relationship. The fact each firm was owned by a sibling and the new firm bought equipment from the old firm added to a finding of no clear fracture.

- In *Size Appeal of Taylor Consultants, Inc.*, SBA No.SIZ-4775 (2006), the OHA found an individual who was identified on the former firm's website as a "principal" and one of four individuals on the management team to be a "key employee." Again, the OHA found no clear line of fracture between the two firms as the two "enjoy the warmest and closest of working relationships." A teaming agreement further showed the close relationship in that they intended to work together exclusively.

Joint Ventures

When firms bid as joint venturers on federal contracting small business opportunities, the SBA's size regulations will treat them as affiliates.[121] The existence of an actual joint venture thus raises the issue of affiliation:

> (h) Affiliation based on joint ventures. A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express 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, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. 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. . . .[122]

Under this definition, a joint venture cannot submit more than three proposals over a two-year period, starting with its first submission.

Due to this affiliation, the receipts of the joint venture will be aggregated to determine its size.[123] If one partner is *other than small*, then the joint venture will be found to be other than small. Unless an exception exists, the joint venture will be ineligible for small business opportunities.[124] Those exceptions are for 8(a) participants; mentor-protégé participants; or, those joint ventures where each participant is small *and* the contract exceeds half of revenue (receipt-based size standard) or $10 million (employee-based size standard).[125]

Affiliation can also be found if one joint venture partner is found to control the other *or* if the entities have formed too many joint ventures together so as to blur their independent identities, then control will be inferred. *See Size Appeal of Weidlinger Associates, Inc.*, SBA No. SIZ -4846 (2007). In essence, the dependence gives rise to affiliation on the basis of a long-term contractual relationship. The "OHA has held this type of long-term participation in a joint venture by a challenged firm with another firm to mandate a finding of affiliation with the second firm on the basis of contractual relationships and identity of interest." *Size Appeal of David Boland, Inc.*, SBA No. SIZ-4965 (2008).

Teaming Arrangements

A teaming arrangement, if done properly, can allow a larger firm to participate as a subcontractor on a government contract under an acquisition program. There are strictures to be followed in order to form a successful team, but if done properly, a finding of affiliation can be avoided.

> The Government will recognize the integrity and validity of contractor team arrangements; *provided*, the arrangements are identified and company relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective.

The Government will not normally require or encourage the dissolution of contractor team arrangements.[126]

In a contractor team arrangement, "1) two or more companies form a partnership or joint venture to act as a potential prime contractor; or 2) a potential prime contractor agrees with one or more companies to have them act as its subcontractors under a government contract or acquisition program."[127] In *Size Appeal of PCCI, Inc.*, SBA No.SIZ-2002 (2003), a small business entered into two teaming agreements with a larger company. The OHA found that the two firms were *not* affiliated through these teaming agreements as the firms had no other ties (i.e. no common management) and the teaming agreements amounted to a small percentage of the smaller firm's combined receipts.

Mentor-Protégé

The SBA has a "mentor-protégé" program which is designed to assist 8(a) participants in successfully competing for federal contracts.[128] Mentors are to provide technical and management assistance, as well as financial assistance (i.e. equity investments or loans), through joint venture arrangements with an 8(a) firm. The joint venture arrangements can be assistance in performing prime contracts or assistance in obtaining subcontracts. Importantly, large firms (as well as small) can be mentors in this program. To qualify as a mentor to an 8(a) participant, a company must:

- Demonstrate the commitment and ability to help the 8(a);
- Possess favorable financial health (including profitability) for last 2 years;
- Possess good character;
- Not appear on federal list of suspended or debarred contractors; and
- Demonstrate the ability to impart value to the protégé from practical experience or its general knowledge of government contracting.[129]

To qualify as a protégé, on the other hand, a firm must:

- Be in the developmental stage of the 8(a) program or have not yet received an 8(a) contract;
- Have a size less than half its corresponding Standard Industrial Classification ("SIC") code;
- Be in good standing in the 8(a) program; and
- Have only one mentor at a time.

To enter into the mentor-protégé program, the firms must enter into a written agreement explaining the protégé's needs and what assistance the mentor agrees to provide. The agreement must be initially approved by the SBA and then reapproved annually. All changes to the written agreement must be approved by the SBA in advance. A mentor can invest an equity interest up to 40% in the protégé firm. Importantly, no determination of affiliation or control may be found between the mentor and protégé based either on the written agreement or any assistance provided thereto.[130] The SBA may not approve the written agreement if the SBA determines that "the assistance to be provided is not sufficient to promote any real developmental gains to the protégé, **or if SBA determines that the agreement is merely a vehicle to enable a non-8(a) participant to receive 8(a) contracts."[131]** In other words, the SBA may find other indicia of affiliation between the two firms, aside from the written agreement, which would allow it to reject the mentor-protégé relationship.

When two firms are approved by the SBA to be mentor and protégé, they may joint venture as a small business and the joint venture becomes exempt from the normal rules of affiliation.[132] The assistance provided by the mentor under an approved mentor-protégé agreement *cannot* be relied upon to make a finding of affiliation. The joint venture agreement, however, must leave control of the contract to the protégé and the program manager must be an employee of the protégé as well. [133]

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[1] Small Business Act of 1953, Pub.L.No.83-163, 67 Stat.232 (codified as amended, 15 U.S.C.§631a et seq.(2000).
[2] 15 U.S.C. §644(g)(1)(2000).
[3] Small Business Act of 1958, Pub.L.No.85-536,72 Stat. 384 (codified as amended, 15 U.S.C. §631a(2000).
[4] Pub.L.No.95-507, §221(j), 92 Stat. 1757 (1978).
[5] 15 U.S.C. §637 (a)(1)(B).
[6] *See* 15 U.S.C. §637(a)(4)(A).
[7] *See* 15 U.S.C. §637(a)(5); 13 C.F.R. §124.103(a).
[8] *See* 15 U.S.C. §637(a)(6); 13 C.F.R. §124.104(a).
[9] 15 U.S.C. § 644(g).
[10]15 U.S.C. § 645 (d) reads:

"(d) Misrepresentation, etc.

(1) Whoever misrepresents the status of any concern or person as a "small business concern," a "qualified HUBZone small business concern", a "small business concern owned and controlled by socially and economically disadvantaged individuals", or a "small business concern owned and controlled by women", in order to obtain for oneself or another any – (A) prime contract to be awarded pursuant to section 638, 644, or 657a of this title; (B) subcontract to be awarded pursuant to section 637(a) of this title; (C) subcontract that is to be included as part or all of a goal contained in a subcontracting plan required pursuant to section 637(d) of this title; or (D) prime or subcontract to be awarded as a result, or in furtherance, of any other provision of Federal law that specifically references section 637(d) of this title for a definition of program eligibility, (1) shall be subject to the penalties and remedies described in paragraph (2).

(2) Any person who violates paragraph (1) shall -

(A) be punished by a fine of not more than $500,000 or by imprisonment for not more than 10 years, or both;

(B) be subject to the administrative remedies prescribed by the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812);

(C) be subject to suspension and debarment as specified in subpart 9.4 of title 48, Code of Federal Regulations (or any successor regulation) on the basis that such misrepresentation indicates a lack of business integrity that seriously and directly affects the present responsibility to perform any contract awarded by the Federal Government or a subcontract under such a contract; and

(D) be ineligible for participation in any program or activity conducted under the authority of this chapter or the Small Business Investment Act of 1958 (15 U.S.C. 661 et seq.) for a period not to exceed 3 years.

[11] 15 U.S.C.§ 645 (d).
[12] *Barker Steel,* 985 F. 2d at 1127.
[13] *Id.*
[14] *Barker Steel*, 985 F.2d at 1133.
[15] *Id.* at 1134.
[16] *U.S. v. Anderson*, 879 F.2d 369,372 (8th Cir. 1989),
[17] *Id.*
[18] *Anderson*, 879 F.2d at 376.
[19] *Ab-Tech Construction v. U.S.*, 31 Fed.Cl. 429 (1994), *aff'd*, 57 F.3d 1084 (Fed.Cir.1995).
[20] *Id.* at 434.
[21] 13 C.F.R.§125.2.
[22] F.A.R.§19.501.
[23] *See* 15 U.S.C.§644(j); F.A.R.§19.502-2.
[24] F.A.R.§19.502-4.
[25] 15 U.S.C. §637(d)(3)(F) and (G).
[26] The statutory framework for the 8(a) program is set forth at 15 U.S.C. §637(a), 13 CFR Part 124, and FAR Subpart 19.8.
[27] SDB requirements include that the SDB must be owned by an individual with a net worth less than $750,000 and must meet industry-specific size standards. 13 C.F.R. §124.1002.
[28] *See* Interim Final Rule RIN 3245-AF79 (which amends certain sections of 13 C.F.R. Part 124).
[29] 13 C.F.R. §124.101.
[30] 13 C.F.R. §124.404.
[31] 13 C.F.R. §124.404.
[32] 13 C.F.R.§124.510.
[33] 8(a) Business Development Program, Small Business Administration, Standard Operating Procedures (200_)(hereinafter "8(a) SOP at __").
[34] 8(a)SOP at 82.

[35] 8(a)SOP at 89.
[36] 8(a)SOP at 142.
[37] 8(a)SOP at 144.
[38] 8(a)SOP at 194.
[39] 8(a)SOP at 191.
[40] 8(a)SOP at 89.
[41] 8(a)SOP at 89.
[42] 8(a)SOP at 136.
[43] 8(a)SOP at 137.
[44] 8(a)SOP at 108
[45] 8(a)SOP at 60-61.
[46] 13 CFR §121.101 et seq.
[47] 8(a)SOP at 66.
[48] *See* 13 C.F.R.§ 121.103; 8(a)SOP at 66.
[49] 8(a)SOP at 167.
[50] 8(a)SOP at 168.
[51] 8(a)SOP at 169.
[52] In fact, DOD has extended *its* Mentor/Protégé program to SDVOSBs and HUBZones. *See* P.L. 108-375, §842.
[53] 8(a)SOP at 181-182.
[54] 8(a)SOP at 184-185.
[55] 8(a)SOP at 187.
[56] 8(a)SOP at 179.
[57] 8(a)SOP at 180.
[58] See, e.g., *Rothe Development Corp. v. DOD*, 545 F.3d 1023 (Fed.Cir. 2008)(10 U.S.C.§2323 - the statute which holds as a goal that 5% of federal defense contracts each year be awarded to entities owned and controlled by "socially and economically disadvantaged individuals" - was held unconstitutional); and *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995)(the Supreme Court held that race-based affirmative action programs must meet a strict scrutiny test to avoid constitutional challenges).
[59] 15 U.S.C.§657f.
[60] 15 U.S.C.§644(g).
[61] Via interim final rule RIN 3245-AF79 (modifications to 13 C.F.R. Part 124).
[62] 13 C.F.R.§125.10.
[63] Theron R. Korsak, *The Service-Disabled Veteran-Owned Small Business in the Federal Marketplace,* Army Lawyer, July 2008. This article spells out the statutory background in great detail and is instructive on providing some context to the SDVOSB program.
[64] www.veteranscorp.org
[65] *In The Matter of: IITS-Nabholz, LLC*, SBA No.VET-114 (2007)(emphasis added).
[66] *Id.*
[67] *Contrast,In the Matter of: McGoldrick Construction Services Corp.*, SBA No. VET-127 (2007), (the service-disabled veteran was CEO, had extensive managerial experience through previous positions, had specific knowledge of the construction industry and had personally attended the pre-bid meeting and walk-through for solicitation) with *IITS-Nabholz, LLC*, SBA No.VET-114 (2007), (the service-disabled veteran had no day-to-day management and administration of operations being attributable to the service-disabled veteran, the veteran was in Maryland, while work site was in Arkansas).
[68] *IITS-Nabholz, LLC*, SBA No.VET-114 (2007). See also *In the Matter of First Capital Interiors, Inc.*, SBA No.VET-112 (2007), a service-disabled veteran located in California could not be said to control or to manage day-to-day operations of an Ohio-centered construction company.
[69] 13 C.F.R. §125.10(d). An illustrative case is *In the Matter of Heritage of America, LLC*, SBA No.VET-142 (2008), where the OHA determined that management was vested in the members and, with an Operating Agreement that required 80% of the membership interest for certain actions, the service-disabled veteran could not control the LLC.
[70] *See In the Matter of Nelco Diversified, Inc.*, SBA No.VET-140 (2008)(where the S-DV held the position of CEO, which position was not established by the by-laws, he does not have "control" as required by the statutes).
[71] SBA No.VET-146 (2009).
[72] *Id.* OHA also took careful note of the fact that the alleged SDVOSB was co-located with an established construction company, one of whose project managers was a minority owner of the alleged SDVOSB.
[73] *Id.*
[74] 13 C.F.R. §126.103.
[75] "Urban" designation changes concurrent with the Census (i.e. every 10 years); "Rural" designation reflects income and employment adjustments and can change annually; and Native American, since it involves Federal recognition and boundaries, has no fixed time changes.
[76]Office of HUBZone, Small Business Administration, HUBZone Program Standard Operating Procedures (2007)(hereinafter, "HUBZone SOP at __").
[77] HUBZone SOP at 1.
[78] *Id.*

[79] HUBZone SOP at 18.
[80] HUBZone SOP at 19.
[81] *See* Small Business Size Regulations; Government Contracting Programs; HUBZone Program, 69 Fed.Reg. 29411-29428 (2004)(codified at 13 C.R.R. Parts 121, 125, and 126) (hereinafter, "HUBZone at __).
[82] 13 C.F.R. §126.501.
[83] HUBZone at 29424.
[84] HUBZone at 29415.
[85] HUBZone at 29427.
[86] HUBZone at 29417.
[87] HUBZone at 29419.
[88] HUBZone at 29426.
[89] HUBZone at 29416.
[90] *GAO-08-964T, Hubzone Program- SBA's Control Weakness Exposed the Government to Fraud and Abuse, Testimony Before the Committee on Small Business, House of Representatives,* (July 2008)(hereinafter "GAO HUBZone Report at __").
[91] GAO HUBZone Report at 4-5,10.
[92] GAO HUBZone Report at 10.
[93] GAO HUBZone Report at 11.
[94] *Id.*
[95] *Millions Cheated Out of Small Business Program,* Associated Press, March 25, 2009 (hereinafter referred to as "AP article at __").
[96] AP article at 1.
[97] *Id.*
[98] *Id.*
[99] AP article at 1.
[100] *Id.*
[101] *Matter of International Program Group, Inc.*, No.B-400278; B-400308 (2008).
[102] "A contract opportunity *shall be awarded* pursuant to this section on the basis of competition restricted to HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price." 15 U.S.C. §657a(b)(20(B)(emphasis added); *see also* FAR §19.305(a).
[103] *International Program Group, Inc.*, at 4-5; *see also* 15 U.S.C. §657f(b)("a contracting officer *may* award…")(emphasis added); and FAR §19.1405(a)("a contracting officer *may* set aside…")(emphasis added).
[104] *International Program Group* at 6.
[105] Guidebook for Facilitating Small Business Team Arrangements, Dep't of Defense (2007) (hereinafter "DOD Guidebook at __").
[106] DOD Guidebook at 1.
[107] *Id.*
[108] DOD Guidebook at 2.
[109] DOD Guidebook at 2.
[110] DOD Guidebook at 2.
[111] "Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists." 13 C.F.R. §121.103(a)(1).
[112] *See* 13 C.F.R. §121.103(c)-(h).
[113] *See Size Appeal of H.R. Allen, Inc.*, SBA No.SIZ-2830 (1988); *see also Size Appeal of David Boland, Inc.*, SBA No.SIZ-4965 (2008).
[114] *Size Appeal of David Boland, Inc.*, SBA No.SIZ-4965 (2008).
[115] *Id.* at 8-9.
[116] *See* A. Franco and S. Koprince, Bonding Assistance for Construction Contracts: The Affiliation Problem (2008).
[117] *Size Appeal of Public Communications Services, Inc.*, SBA SIZ No.5008 (Oct. 17, 2008).
[118] *See Size Appeal of Taylor Consultants, Inc.*, SBA No.SIZ-4775 (2006).
[119] *Size Appeal of American Guard Services*, SBA No. SIZ -.4397 (2000); *see also* 13 C.F.R. §121.103(a)(5).
[120] 13 C.F.R. §121.103(g).
[121] 13 C.F.R. §121.103(h).
[122] 13 C.F.R. §121.103(h).
[123] 13 C.F.R. §121.104(d).
[124] 13 C.F.R. §121.103(h)(3)(i)-(iii).
[125] 13 C.F.R. §121.103(i)-(iii).
[126] FAR §9.603.
[127] FAR §9.601.
[128] FAR §9.601.
[129] 13 C.F.R. §124.520.
[130] 13 C.F.R. §124.520(d)(4); 13 C.F.R. §121.103(b)(6).

[131] 13. C.F.R. §124.520(e)(2) (emphasis added).
[132] 13 C.F.R. §121.103(h)(3)
[133] *See Size Appeal of Lance Bailey & Assoc., Inc.*, SBA No.SIZ-4788 (2006); *Size Appeal of American Security Programs*, SBA No.SIZ-4797 (2006).