



Government Contracts Legal Update: New Rules, Common Pitfalls and Opportunities

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Agenda

Joint Ventures

- Regulations and Noncompliance Consequences
 - 13 C.F.R. § 125.8 (Small Business); 13 C.F.R. § 125.9 (Mentor-Protégé Program); 13 C.F.R. § 128.402 (SDVOB); 13 C.F.R. § 127.506 (WOSB/EDWOSB); 13 C.F.R. § 124.513 (8(a)); and 13 C.F.R. § 126.616 (HUBZone)

SBA Submission Process

- SBA Submissions
 - Changes to 8(a) Social Disadvantage requirements after *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 20-0041, slip op. at 1 (July 19, 2023)

Teaming Agreements

- Uses and Enforceability

Agenda

SBA Affiliation Rules

- 13 C.F.R. § 121.103

The Cybersecurity Maturity Model Certification (CMMC)

- Proposed rule to implement CMMC 2.0 under 32 C.F.R. Part 170

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- SBICS
- ESOPs
- Full and Open Sales

Section 1

Joint Ventures



Section 1: Joint Ventures

Regulations

- 13 C.F.R. § 125.8 (Small Business); 13 C.F.R. § 125.9 (Mentor-Protégé Program); 13 C.F.R. § 128.402 (SDVOB); 13 C.F.R. § 127.506 (WOSB/EDWOSB); 13 C.F.R. § 124.513 (8(a)); and 13 C.F.R. § 126.616 (HUBZone)
- Example Compliance Matrix
- Sample Addendum

Limitation on Subcontracting under 13 C.F.R. §125.6

Joint Venture Workshare Requirements

- 13 C.F.R. §§ 125.8(c)(1), 128.402(d)(2), 124.513(d)(2), 126.616(d)(2), 127.506(d)(2)

Negative Control

- 13 C.F.R. §§ 125.8(b)(2)(ii), 128.402(c)(2), 124.513(c)(2), 126.616(c)(2), 127.506(c)(2)

Utilization of Joint Ventures to meet Subcontracting Plan Goals

- 13 C.F.R. § 125.3 and 48 CFR 52.219-9.

Joint Ventures: Compliance Matrix

SBA Joint Venture Compliance Index	
The following is an index of the SBA Joint Venture requirements and the following Sections in the Joint Venture agreement where they appear.	
SBA JV Agreement Requirement	JV Section
13 C.F.R. §§ 125.8(b)(2)(i), 128.402(c)(1), 124.513(c)(1), 126.616(c)(1), 127.506(c)(1) A provision setting forth the purpose of the joint venture.	1.1 *
13 C.F.R. §§ 125.8(b)(2)(ii), 128.402(b)(2)(ii), 124.513(c)(2), 126.616(c)(2), 127.506(c)(2) A provision designating the socio-economic small business concern as the managing venturer.	2.0
13 C.F.R. §§ 125.8(b)(2)(ii), 128.402(c)(2), 124.513(c)(2), 126.616(c)(2), 127.506(c)(2) A provision designating a named employee of the socio-economic small business concern managing venturer as the manager with ultimate responsibility for performance of the contract (the "Responsible Manager").	2.2 *
13 C.F.R. §§ 125.8(b)(2)(ii), 128.402(c)(2), 124.513(c)(2), 126.616(c)(2), 127.506(c)(2) A provision stating that the managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.	2.0 2.1
13 C.F.R. §§ 125.8(b)(2)(ii), 128.402(c)(2), 124.513(c)(2), 126.616(c)(2), 127.506(c)(2) A provision stating that the individual identified as the Responsible Manager of the joint venture need not be an employee of the socio-economic small business concern at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the socio-economic small business concern if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the socio-economic small business concern for purposes of performance under the joint venture.	2.2
13 C.F.R. §§ 125.8(b)(2)(ii), 128.402(c)(2), 124.513(c)(2), 126.616(c)(2), 127.506(c)(2) A provision stating that although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the managing venturer, those managers must report to and be supervised by the joint venture's Responsible Manager.	2.2
13 C.F.R. §§ 125.8(b)(2)(iii), 128.402(c)(3), 124.513(c)(3), 126.616(c)(3), 127.506(c)(3) A provision stating that with respect to a separate legal entity joint venture the socio-economic small business concern must own at least 51% of the joint venture entity.	3.0
13 C.F.R. §§ 125.8(b)(2)(iv), 128.402(c)(4), 124.513(c)(4), 126.616(c)(4), 127.506(c)(4) A provision stating that the socio-economic small business concern must receive profits from the joint venture commensurate with the work performed by the socio-economic small business concern, or a percentage agreed to by the parties to the joint venture whereby the socio-economic small business concern receives profits from the joint venture that exceed the percentage commensurate with the work performed by the socio-economic small business concern. At the conclusion of the joint venture contract(s) and/or the termination of a joint venture, any funds remaining in the joint venture bank account shall distributed at the discretion of the joint venture members according to percentage of ownership.	4.0
13 C.F.R. §§ 125.8(b)(2)(v), 128.402(c)(5), 124.513(c)(5), 126.616(c)(5), 127.506(c)(5) A provision providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. All payments due the joint venture for performance on an socio-economic small business contract (or total small business contract) will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well.	5.0

13 C.F.R. §§ 125.8(b)(2)(vi), 128.402(c)(6), 124.513(c)(6), 126.616(c)(6), 127.506(c)(6) A provision itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available.	6.0 7.0 *
13 C.F.R. §§ 125.8(b)(2)(vii), 128.402(c)(7), 124.513(c)(7), 126.616(c)(7), 127.506(c)(7) A provision specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the socio-economic small business partner to the joint venture will meet the performance of work requirements set forth under the relevant joint venture regulation, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the socio-economic small business partner to the joint venture will meet the performance of work requirements set forth under the relevant joint venture requirement, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available.	6.0 9.0 10.0 *
13 C.F.R. §§ 125.8(b)(2)(viii), 128.402(c)(8), 124.513(c)(8), 126.616(c)(8), 127.506(c)(8) A provision obligating all parties to the joint venture to ensure performance of the socio-economic small business contract and to complete performance despite the withdrawal of any member.	1.2 10.1
13 C.F.R. §§ 125.8(b)(2)(ix), 128.402(c)(9), 124.513(c)(9), 126.616(c)(9), 127.506(c)(9) A provision designating that accounting and other administrative records relating to the joint venture be kept in the office of the socio-economic small business managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request.	11.0 12.0
13 C.F.R. §§ 125.8(b)(2)(x), 128.402(c)(10), 124.513(c)(10), 126.616(c)(10), 127.506(c)(10) A provision requiring the final original records be retained by the socio-economic small business managing venturer upon completion of the socio-economic small business contract performed by the joint venture.	12.0
13 C.F.R. § 125.8(b)(2)(xi) A provision stating that annual performance-of-work statements required by paragraph (h)(1) must be submitted to SBA and the relevant contracting officer not later than 45 days after each operating year of the joint venture.	15.0 19.0
13 C.F.R. §§ 128.402(c)(11), 124.513(c)(11), 126.616(c)(11), 127.506(c)(11) A provision stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture.	13.0
13 C.F.R. § 125.8(b)(2)(xii) A provision stating that a project-end performance-of-work required by paragraph (h)(2) must be submitted to SBA and the relevant contracting officer no later than 90 days after completion of the contract.	16.0 19.0
13 C.F.R. §§ 128.402(c)(12), 124.513(c)(12), 126.616(c)(12), 127.506(c)(12) A provision stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.	14.0

*For these provisions, Parties agree to execute the Joint Venture Contract Addendum, the form of which is attached hereto, on procurement efforts for any Contract for which the Company pursues.

Joint Ventures: Sample Addendum

WHEREAS, The Members desire to compete for, and submit a proposal in response to, the Solicitation and, if awarded to the Company, to cause the Company to execute a contract (“Contract”) and to perform the Contract for the Client.

WHEREAS, The Members desire to enter into this Addendum, as more specifically set forth herein.

IN WITNESS WHEREOF, in consideration of the foregoing, and other good and valuable consideration, the Members hereby agree as follows:

1. All capitalized terms used, but not defined, in this Addendum shall have the meaning ascribed to such terms in the Agreement. This Addendum is a supplement to the terms and conditions of the Agreement. In the event of any inconsistency between this Addendum and the Agreement, the terms and conditions of this Addendum shall govern.

2. The Members hereby agree to use the JV, LLC joint venture to compete for and to submit a proposal in response to the Solicitation. To that end, this Addendum and the Agreement, together, shall constitute the Company’s joint venture agreement, as defined under the SBA Joint Venture Regulations, for the purpose of submitting a proposal in response to the Solicitation.

3. In connection with the preparation of the Company’s proposal, the Members’ respective duties shall be as follows:

Managing: [PROPOSAL DUTIES]

Participating: [PROPOSAL DUTIES]

4. In the event the Prime Contract is awarded to the Company, the Joint Venture Members’ respective duties and responsibilities for negotiation of the Contract, source of labor, and the performance of the Prime Contract, including ways that the Members will ensure that the joint venture and Managing will meet the performance of work requirements set forth under the SBA Joint Venture Regulations, as applicable, shall be as follows:

Managing:

- Contract Negotiation and Point of Contact
 - Managing, as the Managing Venturer, shall have sole responsibility for negotiating any awarded Contract to the Company. Managing, by and through the Responsible Manager, shall also be the primary point of contact between the Government and the Company during the Contract negotiation and Contract performance

Participating:

- Contract Negotiation and Point of Contact
 - Participating will provide support as and when requested by Managing regarding Contract negotiation and any communications Managing has with the Client during Contract performance.
- Source of Labor
 - [INSERT]
- Responsibilities During Contract Performance
 - [INSERT]

5. Meeting Performance of Work Requirements. Managing shall ensure, with Participating’s assistance, that the final proposal submitted to the Government complies with the requirements under the SBA Joint Venture Regulations, as applicable. In addition, where the Government awards a Contract to the Company, Managing shall hold periodic meetings with Participating to review and ensure compliance with the workshare requirements under the applicable SBA Joint Venture Regulations.

6. In the event the Prime Contract is awarded to the Company, the Members’ the major equipment, facilities and other resources to be furnished by each Member (together with a detailed schedule of cost or value of each such item, where practical) shall be as follows:

Managing:

- Facilities
 - [INSERT]
- Equipment
 - [INSERT]
- Other Resources
 - [INSERT]

Participating:

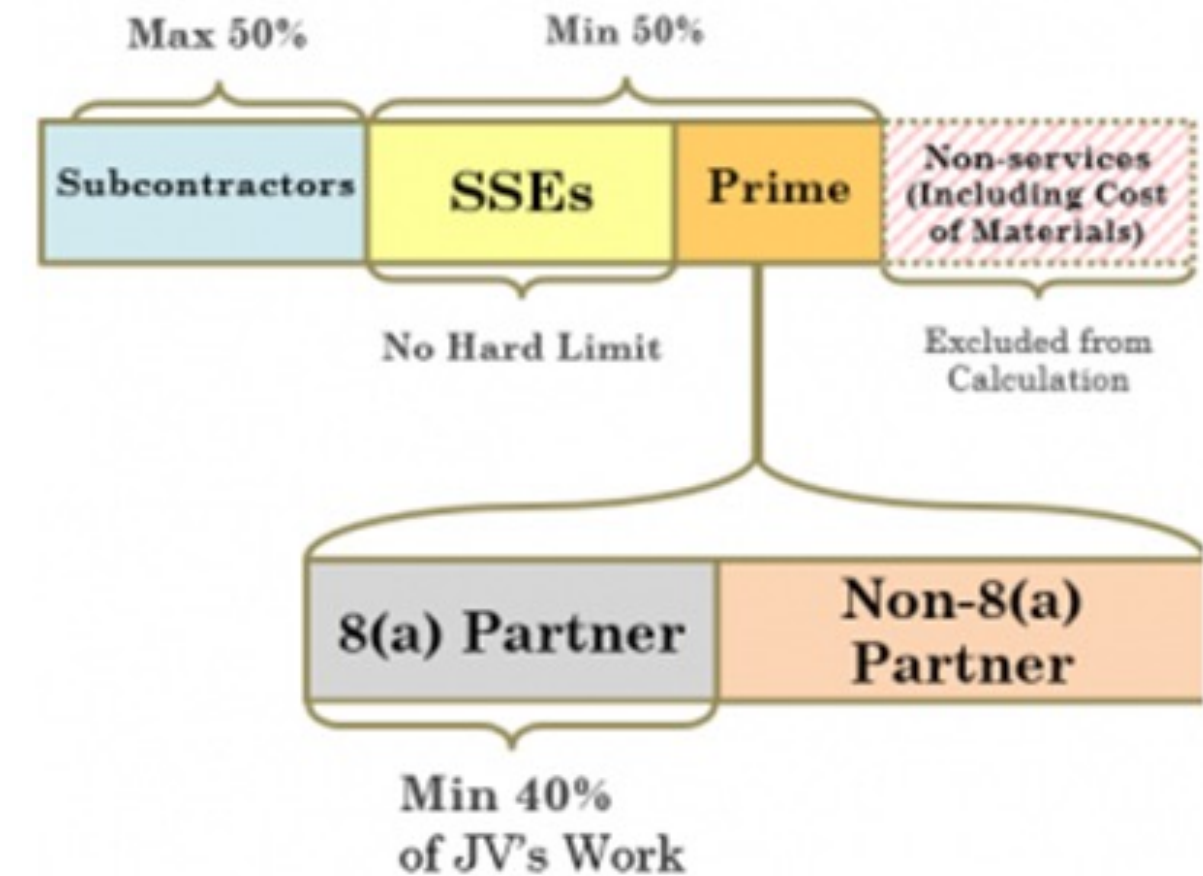
- Facilities
 - [INSERT]
- Equipment
 - [INSERT]
- Other Resources
 - [INSERT]

7. The Responsible Manager for the Contract shall be [NAME OF RESPONSIBLE MANAGER FROM MANAGING], or such other Managing employee, as appointed by Managing from time to time.

IN WITNESS WHEREOF, the parties hereto have executed or caused the execution of this Agreement as of the Effective Date.

Joint Ventures: Limitation on Subcontracting

- Under 13 CFR § 125.6, the SBA requires any prime contractor awarded a full or partial small business (or other socio-economic) set-aside contract with a value greater than the simplified acquisition threshold (as defined in 48 CFR 2.101 (generally any contract above \$250,000)) to perform a certain percentage of the contracted work. The limitations depend on the various types of federal contracts as follows:
 - A 50% limitation for services contracts and contracts for supplies or products (other than from a nonmanufacturer);
 - An 85% limitation for general construction contracts; and
 - A 75% limitation for specialty trade contracts
- This limitation does not apply to “Similarly Situated Entities” (SSEs) as defined in 13 § 125.6(c)
- For some categories of contracts, the rule excludes the dollar value of certain items from the total contract dollar value amount prior to applying the subcontracting percentage. The most common exclusion is that for the cost of materials for all construction contracts and supply contracts.



This figure represents an example of how these cost and SSE exclusions could apply towards the limitations on subcontracting in a supply contract

Joint Ventures: Workshare Requirements

- Under 13 § 125.8(c)(1), most joint ventures seeking set-aside are required to ensure that qualifying venturer performs a minimum of 40% of the work that the joint venture itself will perform.
- On October 16, 2020, the Small Business Administration (SBA) published its Final Rule related to Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments (85 Fed. Reg. 66146) (the “Final Rule”).
- The Final Rule notes that the SBA “has always intended that the same rules as those set forth in § 125.6 should generally apply to the calculation of a protégé firm’s workshare in the context of a joint venture.”
- This means that calculating compliance with the 40% minimum workshare requires measuring dollars, not labor hours.
- However, the work must be more than administrative or ministerial functions so that the small business partner gains substantive experience.
- The Final Rule provided the following helpful example:
 - [I]f a joint venture between a protégé firm and its mentor were awarded a \$10 million services contract and a similarly situated entity were to perform \$2 million of the required services, the joint venture would be required to perform \$3 million of the services (i.e., to get to a total of \$5 million or 50 percent of the value of the contract between the joint venture and the similarly situated entity). If the joint venture were to perform \$3 million of the services, the protégé firm, and only the protégé firm, must perform at least 40 percent of \$3 million or \$1.2 million.

Joint Ventures: Negative Control

On May 30, 2023, the SBA issued the Final Rule on Ownership and Control and Contractual Assistance Requirements for the 8(a) Business Development Program (the “Final Rule”). The Final Rule added the following language to the small business joint venture regulations found at 13 CFR § 125.8(b)(2)(ii)(A):

The joint venture agreement may not give to a non-managing venturer negative control over activities of the joint venture, unless those provisions would otherwise be commercially customary for a joint venture agreement for a government contract outside of SBA's programs. A non-managing venturer's approval may be required in, among other things, determining what contract opportunities the joint venture should seek and initiating litigation on behalf of the joint venture.

In *Size Appeal of Southern Contracting Solutions III, LLC*, SBA No. SIZ-5956 (2018), OHA listed the following as **ordinary actions**, which demonstrate a minority member having control over the daily operations of a concern, and thus do constitute negative control:

- Control over the budget;
- Power to hire and fire officers;
- Control over employee compensation;
- Ability to borrow money;
- Purchasing equipment;
- Making changes to a budget;
- Bringing or defending a lawsuit;
- Creation of debt;
- Payment of dividends;
- Amending or terminating leases;
- Encumbering assets; or
- Requiring that all actions taken to manage the company require a vote of 75 percent of the members.

Joint Ventures: Subcontracting Plan Goals

- FAR 19.702(a) states that a subcontracting plan is only needed when a contractor that is not a small business is awarded a federal contract over the Simplified Acquisition Threshold (SAT) of \$750,000.
- Although no subcontracting plan is needed when your joint venture is a small business, it is important to understand how the work done by the joint venture may be counted towards a prime contractor's subcontracting plan.
- The Final Rule discussed in the Negative Control slide also revised 13 C.F.R. § 125.3(a)(1)(i)(B) to state that:
 - “[p]urchases from a corporation, company, or subdivision that is an affiliate of the prime contractor or subcontractor, or a joint venture in which the contractor is one of the joint venturers, are not included in the subcontracting base. Subcontracts by first-tier affiliates, and subcontracts by a joint venture in which the prime contractor is one of the joint venturers, shall be treated as subcontracts of the prime.”
- The Final Rule clarified that when “an other-than-small contractor subcontracts to its own unpopulated joint venture, [only] the work performed by a small-business member of that joint venture is considered a subcontract and the contractor may take subcontracting credit for [only that portion of] small-business work.”

Section 2

SBA Submission Process



SBA Submission Process

- MySBA Certifications is a new, single application for all SBA federal contracting certifications that will (hopefully) open to the public in September.
- Starting August 1st, SBA will pause accepting new federal contracting certification applications while we implement this upgrade.
- The pause does not affect the Mentor Protégé Program, required reporting of material changes, or required annual recertification/renewal for HUBZone and 8(a) participants.
- The Certify Knowledge Base has many helpful articles on common submission errors and general submission guidance. See the following link:
 - sbaone.atlassian.net/wiki/spaces/CHDB/overview
- The certification upgrade page can be found at the following link:
 - certify.sba.gov/upgrade

Changes to 8(a) Social Disadvantage Requirement

- The definition of social disadvantage means that an individual has been subjected to racial, ethnic, or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. See 13 CFR 124.103(c).
- *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 20-0041, slip op. at 1 (July 19, 2023) removed rebuttable presumption.
- Social Narrative now required. Must describe who, what, where, why, when, and how discrimination or bias occurred.
- The SBA guide for the Social Disadvantage Narrative can be found at:
 - <https://sbaone.atlassian.net/wiki/spaces/CKB/pages/2768076819/Guide+for+Demonstrating+Social+Disadvantage>

Section 3

Teaming Agreements



Teaming Agreements: Uses and Enforceability

- FAR Subpart 9.6 governs teaming agreements:
 - Two or more companies form a partnership or joint venture to act as a potential prime contractor” and/or
 - A potential prime contractor agrees with one or more other companies to have them act as subcontractors under a specified government contract or acquisition program
- “Open and unrestricted” teaming agreements constitute “agreements to agree” and are not typically enforceable
- “Defined” teaming agreements with tangible scope, cost and duration terms are enforceable
- Exclusivity provisions

Teaming Agreements: Uses and Enforceability

- After extensive review of relevant case law, a “defined” Teaming Agreement that is generally enforceable incorporates the following elements:
 - Avoids language that makes an award of a subcontract subject to the negotiation of the terms of a subcontract
 - Includes as many of the essential terms of a subcontract (scope of work, price, quantity, place of performance, etc.) and attaches a copy of a proposed subcontract containing those terms and conditions as an exhibit to the TA
 - Includes strong language that a subcontract will/shall/must be awarded to the subcontractor if the prime receives an award of a prime contract in the form attached to TA (ideally within 5 days of award)
 - Includes language that it is the intent of the parties to enter into a binding contract in accordance with the terms of the TA
 - Avoids the inclusion of any provision making the inability of the parties to reach an agreement on the terms of a subcontract an event, which causes the termination of the TA

Section 4

SBA Affiliation Rules



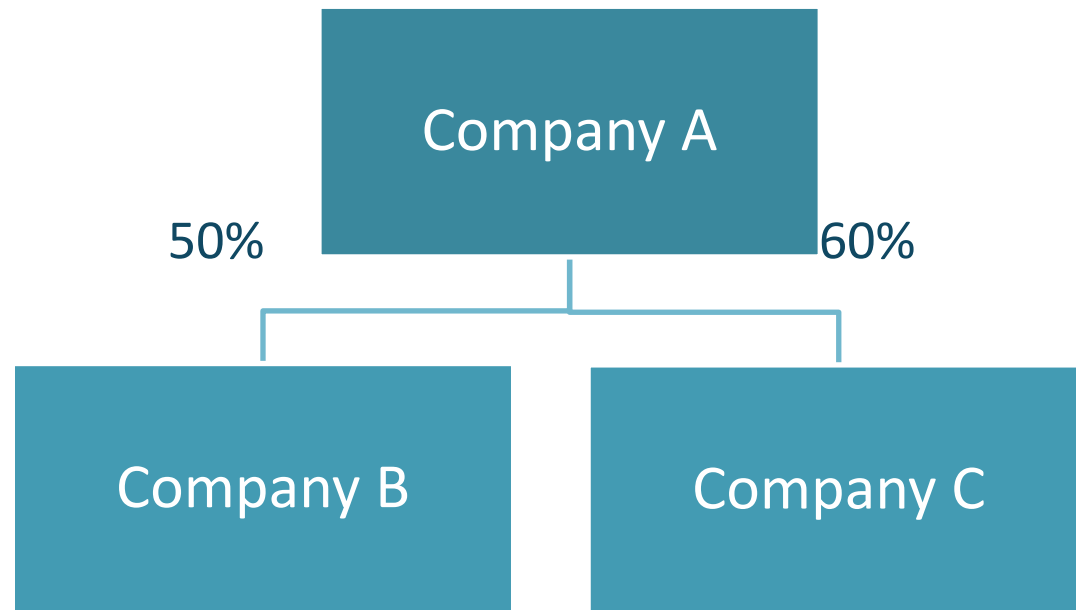
Affiliation

- Small businesses must count all affiliates as part of their size calculations.
- Affiliates:
 - Entities that control or have the power to control the other
 - Third-party controls or has the power to control both entities
 - Indirect control included
- SBA's Guidebook for Affiliation can be found at the following link:
 - https://www.sba.gov/sites/default/files/2020-10/AFFILIATION%20GUIDE_Updated%20%28004%29-508.pdf

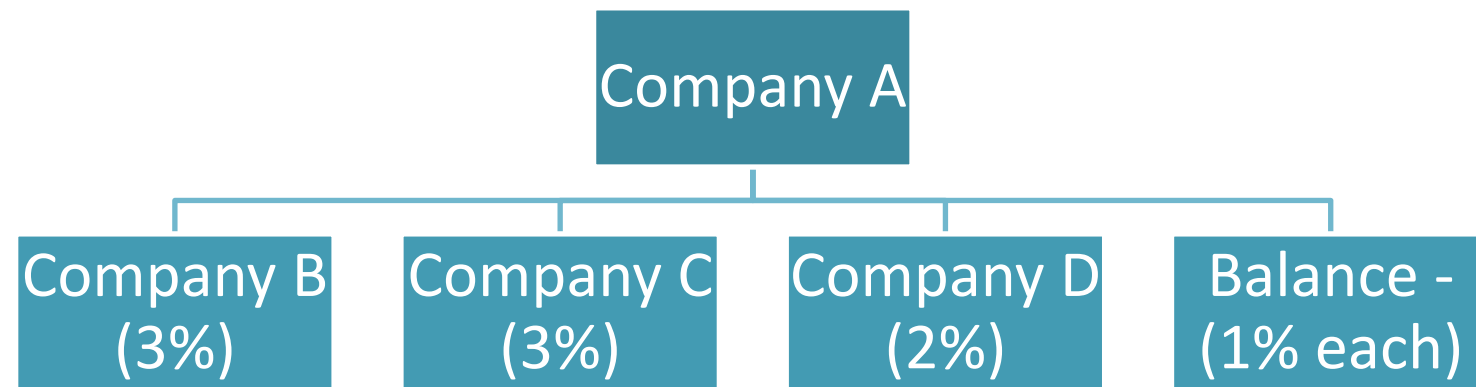
Ten Types of Affiliation

- Ownership
- Stock options, convertible securities, or an agreement to merge
- Common management
- Identity of interest
- Newly organized concern
- Common investment/economic dependence
- Joint ventures
- Ostensible subcontractor
- Franchise or license agreement
- Totality of the circumstances

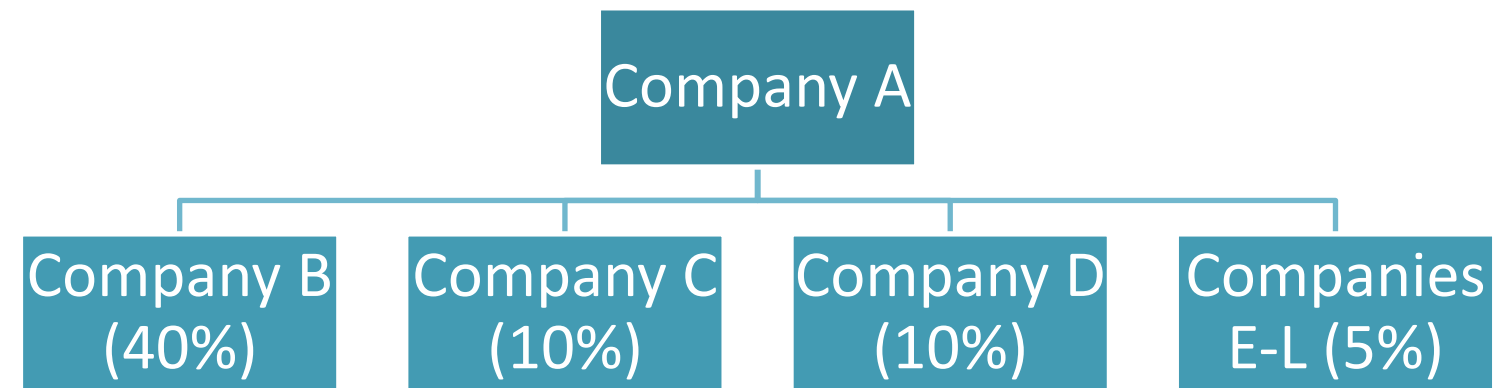
Ownership



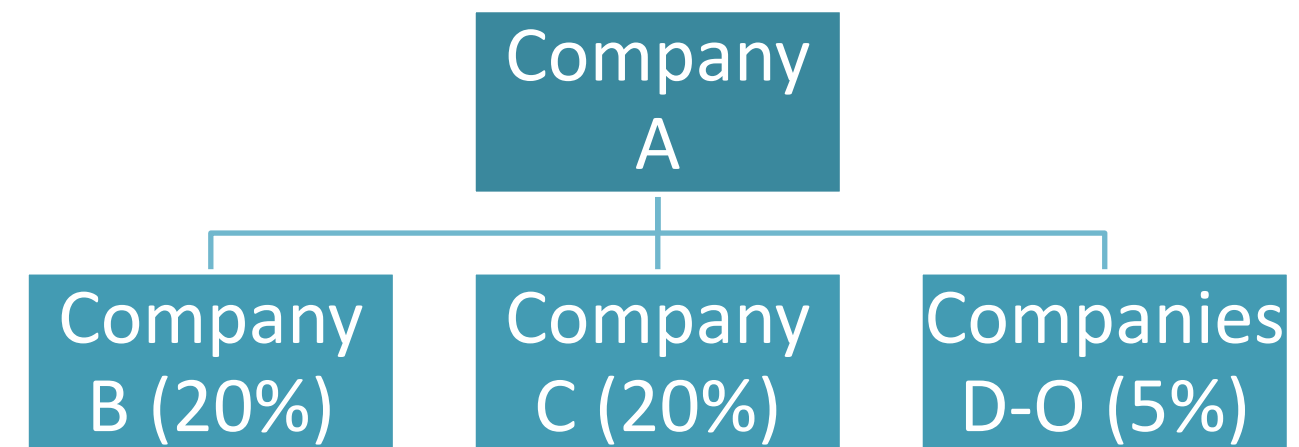
Company A controls both Companies B & C – all companies are affiliated



Company A's stock is widely held – No single block of stock is large comparatively – Company A is controlled by its CEO and Board of Directors & NOT affiliated with any of its owners.

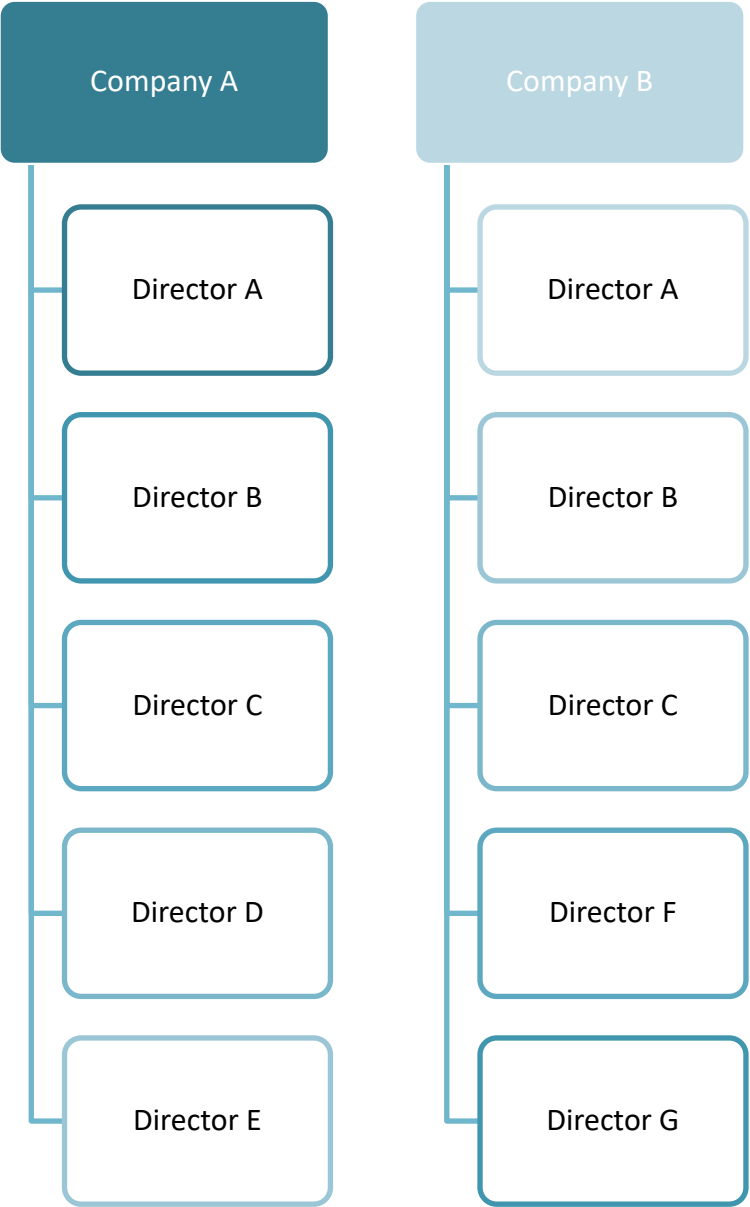


Company B controls a minority of Company A, but its block of stock is large in comparison to the other owners – Company A is affiliated with Company B

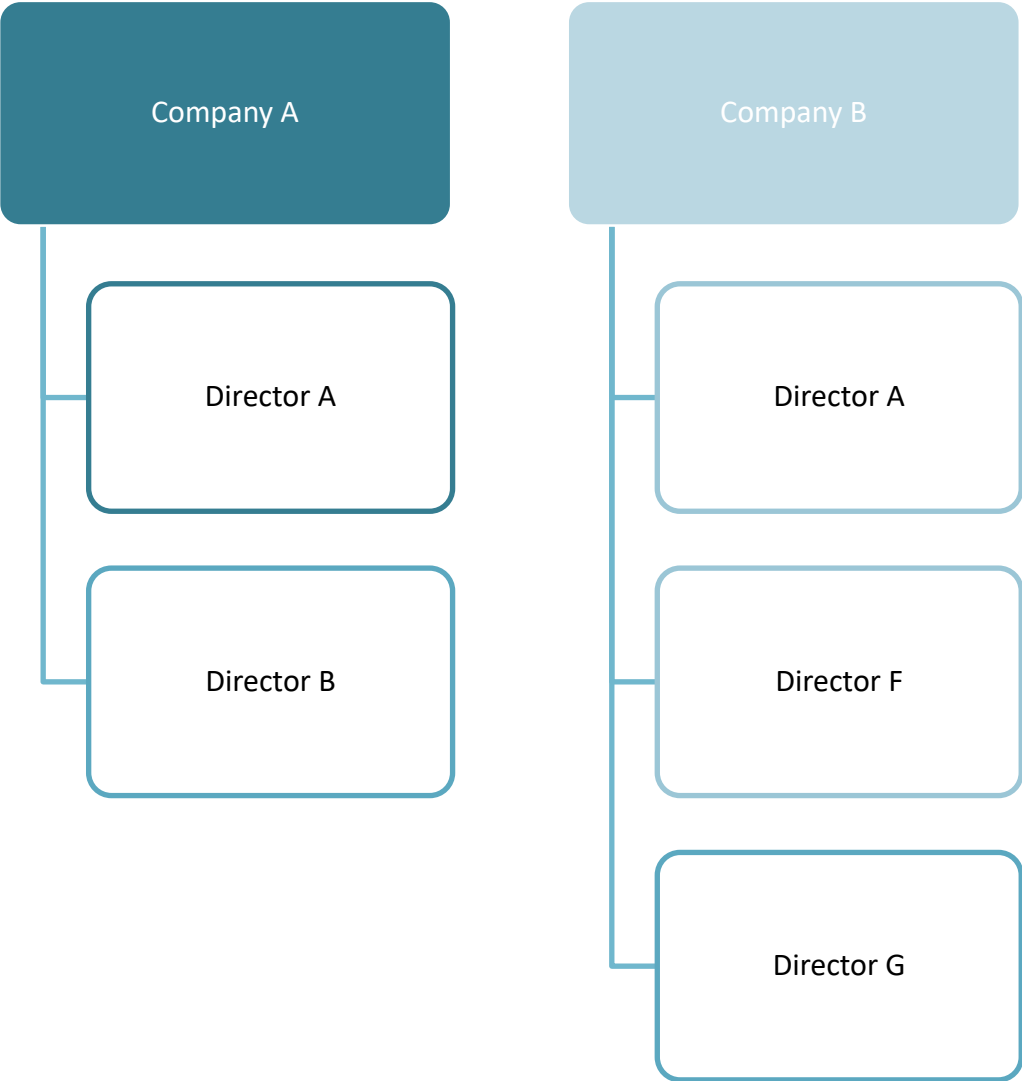


Companies B & C each control a minority of Company A, but together their block of stock is large in comparison to the other owners – Company A is affiliated with Company B and Company C

Common Management



Three of Company B's board members are also members of Company A's board – the two companies are affiliated.



Director A controls company A's board and has veto power over the decisions of Company B's board – this is negative control and the two companies are affiliated.

Joint Venture Affiliation

- Default rule is parties to a JV are affiliated for particular contract if the JV submits a proposal for that contract. The JV is measured on a combined basis of the parties.
- Parties are not affiliated if:
 - all parties are small
 - parties have an approved mentor-protégé agreement and the JV is within its viable time period of two years from the date of first award.
- Notwithstanding, the parties are affiliated if the JV bids on a contract outside the two year period from the date of its first award.

Common Exceptions to Affiliation Rules

- SBIC ownership
- Indian Tribes, Alaska Native Corporations, Native Hawaiian Organizations, Community Development Corporations
- Employee leasing companies
- Mentor-protégé relationships

Section 5

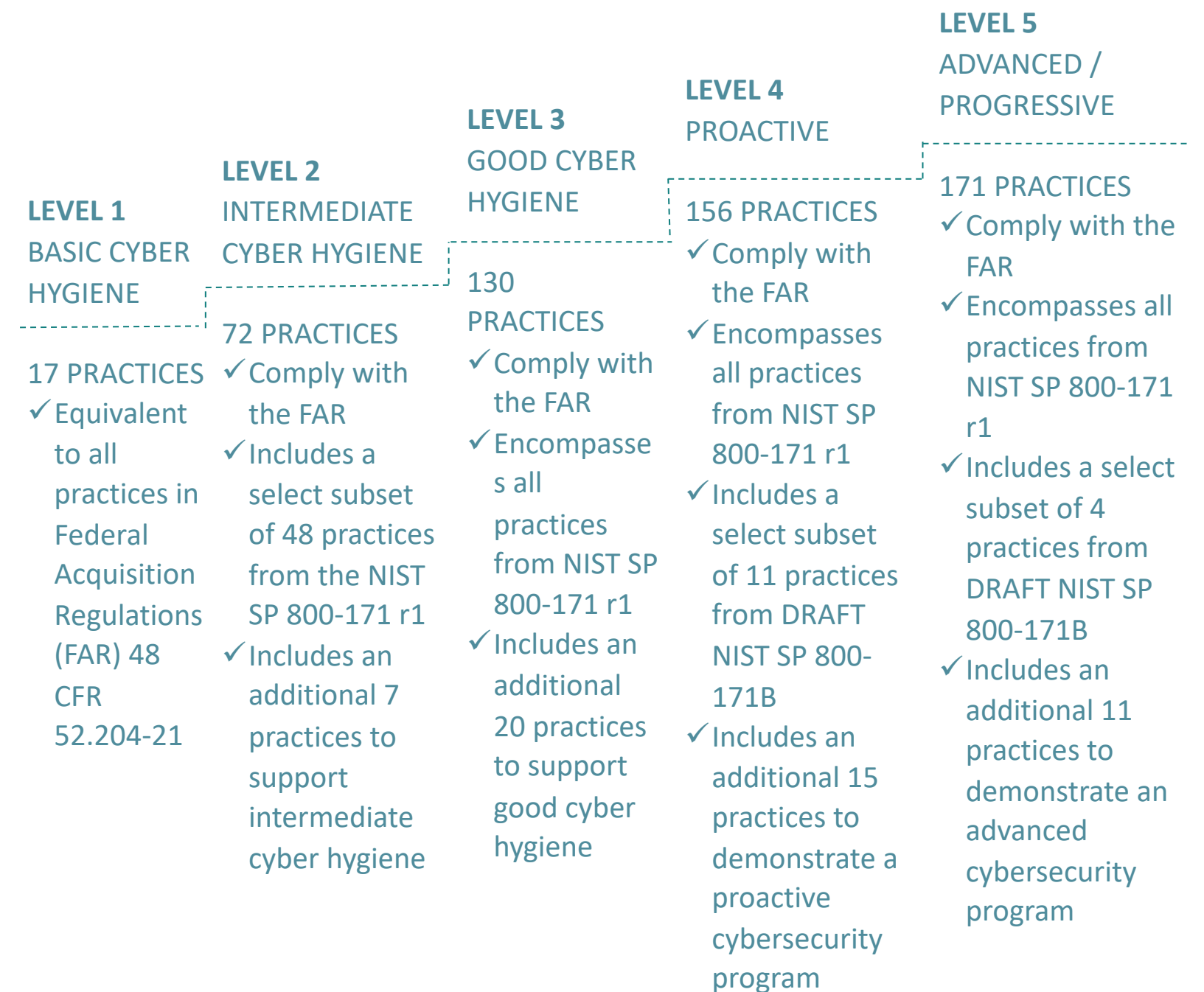
CMMC & CMMC 2.0



CMMC

- In 2019, the Department of Defense (DoD) announced the development of the Cybersecurity Maturity Model Certification (CMMC) Program, which was then implemented in 2020 as an interim rule.
- The CMMC Program aims at protecting two kinds of information: Federal Contract Information (FCI) and Controlled Unclassified Information (CUI).
 - FAR 52.204-21 defines FCI as information that comes from a contract that is not marked for public release.
 - 32 C.F.R. § 2002.4 defines CUI as information that, while unclassified, agencies must or are permitted to safeguard or otherwise control the dissemination of.
- The CMMC includes 5 levels of security requirements

CMMC Progression



CMMC 2.0

- In late December 2023, the DoD issued proposed changes to the CMMC program for “CMMC 2.0,” a plan that DoD began work on back in 2021.
- The biggest change with CMMC 2.0 is that it appears it would simplify the leveling system and make CMMC Level 3 the highest level. Per the proposed rule, it would eliminate Levels 2 and 4, and rename the remaining three CMMC Levels as follows:
 - Level 1 will remain the same as CMMC 1.0 Level 1 (15 security requirements for the transfer of FCI outside the government);
 - Level 2 will be similar to CMMC 1.0 Level 3 (110 security requirements from NIST SP 800-171); and
 - Level 3 will be similar to CMMC 1.0 Level 5 (110 security requirements from NIST SP 800-171).

CMMC 2.0

Level 3 Expert	110+ requirements based on NIST SP 800-172 and 800-171	Triennial government assessment
Level 2 Advanced	110+ requirements aligned with NIST SP 800-171	Triennial third party assessment or self- assessment (depending on the company and information handled)
Level 1 Foundational	15 requirements specified in FAR Clause 52.204-21	Annual self-assessment

Section 6

Exit Strategies



Small Business Investment Companies (“SBIC”)

- The SBA grants licenses to certain businesses to allow them to invest in and/or loan money to small businesses. Established under the Small Business Investment Act of 1958.
- On September 5, 2023, the SBA issued SOP 10100 to reinvigorate the program, replacing all prior SOPs and Technotes.
- The program provides for enhanced financing techniques (Accrual SBICs and Reinvestor SBICs)
- The program provides for SBICs to make investments into companies without them becoming affiliated. This provides a marketplace for small companies to raise capital without losing their status.
- Parallel to this, the 2024 NDAA created the Office of Strategic Capital which seeks to use SBA SBICs to “focus on strategic capital needs where public support is required to attract private investment, especially for critical component technologies.

SBICCTs – Small Business Investment Company Critical Technology

- 2024 Investment Strategy for the Office of Strategic Capital by Sec Def Lloyd Austin notes that SBICCT status will be awarded to applicants looking to fund small companies within the set list of 14 technology domains below. They could be eligible for OSC loan guarantees for early stage investment or scaled production, funding for commercialization funding for scaled production of critical technologies and other support.

Biotechnology
Quantum Science
Future Generation Wireless Technology
Advanced Materials
Trusted AI and Autonomy
Integrated Network System-of-Systems
Microelectronics

Space Technology
Renewable Energy Generation and Storage
Advanced Computing and Software
Human-Machine Interfaces
Directed Energy
Hypersonics
Integrated Sensing and Cyber

Employee Stock Ownership Plan (“ESOP”)

- Internal Revenue Code Section 401(a) – defines an ESOP as a qualified defined contribution plan designed to invest primarily in stock of the Employer. The employees receive contributions to their plan, which in turn purchases stock of the company and the employees become owners of the company.
- Contributions are typically a percentage of wages, often matched by the company
- Popular among small government contracting businesses with contracts set aside for small business. These businesses are not eligible to sell to large businesses that can not keep the set aside contracts.
- Tax reasons also make ESOPs popular:
 - S Corporation – exempt from income tax
 - IRC Section 1042 – Selling shareholders may be able to rollover gain
- Many local success stories: Camber Corporation, Dynetics, i3, Radiance, Torch, nLogic, PeopleTec, Gleason Research and others. Many have managed to remain small under certain NAICs codes despite substantial growth.

Small Government Contractor selling to a large government contractor

- 13 CFR 121.404(A) – generally the size of a business is measured at the time of certification along with its submission of initial offer or response which includes price.
- Section 121.404(g) addresses the case of a merger, acquisition or sale.
 - Contractor must recertify within 30 days of a change of control. If it is NOT small, the agency can no longer take credit toward small business goals. Consider how the large business factors this risk.
 - There are other nuances for parties to JVs, awards made after 180 days of bid submission, etc.
- The current rules for Blanket Purchase Agreements and Multiple Award Contracts (“MAC”) requires the contractor to recertify at the Contract level, but the contractor remains eligible to bid on Task Orders for the life of the MAC. See *Size Appeal of LinTech Global, Inc*, SBA No. SIZ-6287 (2024) and *Washington Business Dynamics*, B-421953, B421953.2, December 18, 2023.
- August 23, 2024, SBA issued Proposed Rules to enforce its position that once a business recertifies at the MAC level as other than small, it will be treated as a “disqualifying recertification,” and the company will not receive any further orders under the MAC.
- The take-away is consider the strategy of a large business buyer to preserve the work pipeline, if possible, and if not, what are the consequences to the small business seller.

Thank you



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