Joint Ventures Given More Edge In Set-Aside Contract Awards

By **Roger Abbott and Stephen Ramaley** (July 11, 2023)

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It is not any exaggeration to say that mentor-protégé joint ventures, or MPJVs, have taken over the world of set-aside governmentwide acquisition contracts.

For example, late last year it was reported that the initial award list for the National Institutes of Health's CIO-SP4 small business procurement was mostly composed of mentor-protégé joint ventures.[1]

As a result, there is growing sentiment that using an MPJV is now required to win a seat on large, set-aside vehicles. This understanding was reinforced by recent changes to the U.S. General Services Administration's One Acquisition Solution for Integrated Services+, or OASIS+, procurement, reflected in the government solicitations released June 15.[2]

So, how long will this MJPV wave last? The short answer: A long time.

The policy and legal mechanisms that got us here are not easily unwound because they are baked into the procurement regulations and, in recent years, have become deeply ingrained in federal procurement case law promulgated by the U.S. Government Accountability Office, the U.S. Small Business Administration's Office of Hearings and Appeals and the U.S. Court of Federal Claims.

As a result, it is imperative that contractors understand the impact of regulations and case law on MPJV utilization — otherwise they will continually lose awards to MPJVs or fail to fully leverage their own MPJVs to maximize point scores.

Here's how the Court of Federal Claims recent decision concerning the Polaris Program, SH Synergy LLC v. U.S.[3] — and the GSA's response to that case in the newly released OASIS+ request for proposals — have remolded evaluation schemes to favor MPJVs to an even greater extent than they did in the past.[4]

The Court Decision

Earlier this year, the Court of Federal Claims enjoined the GSA from evaluating proposals and awarding contracts under Polaris, a massive set-aside governmentwide acquisition contract for IT services, which will reportedly result in $60 billion to $100 billion in task-order awards over its 10-year lifespan. Although the court affirmed several aspects of the program, it identified two flaws.

First, the court agreed with the protesters that the Polaris solicitations violated SBA regulations by evaluating the experience submissions of protégé firms according to the same self-scoring point system that awarded offerors with larger projects more points than those with smaller projects.

This holding turned on the meaning of the following sentence from Title 13 of the Code of Federal Regulations, Section 125.8(e):

> A procuring activity may not require the protégé firm to individually meet the same evaluation or responsibility criteria as that required of other offerors generally.

The court focused on the word "evaluation," and rejected the GSA's argument that it complied with the regulation by permitting the protégé to submit only one primary relevant experience project, even as other offerors had to submit at least three such projects. The court focused on the fact that all projects were subject to the same evaluation criterion, no matter how many projects were submitted.

The court found Section 125.8(e) to be unambiguous and refused to defer to the GSA's interpretation.

Arguably, this SBA regulation is more ambiguous and open to agency interpretation than the court concluded. The court's holding fails to reconcile the linguistic reality that the terms "meet" and "evaluation" are an uneasy fit. Ordinarily, agencies apply evaluation criteria and assess whether the offeror meets a requirement; offerors do not "meet" evaluation criteria.

This tension could have been resolved by interpreting "evaluation criterion" to mean "requirement" in this context. And under such interpretation, the solicitation would have complied with Section 125.8(e) because it allowed protégés to submit only a single project while requiring other firms to submit at least three projects. In that fashion, the request for proposals did not subject protégés to same requirements as other offerors.

This interpretation is consistent with the SBA's 2020 final rule,[5] which introduced the current iteration of Section 125.8(e). On the one hand, the SBA expects that protégés bring something to the table: "SBA's rules require a small business protégé to have some experience in the type of work to be performed under the contract."

On the other hand, the SBA states that agencies should not impose the same requirements on protégés:

> SBA believes that a solicitation provision that requires both a protégé firm and a mentor to each have the same level of past performance (e.g., each partner to have individually previously performed five contracts of at least $10 million) is unreasonable, and should not be permitted.[6]

Consistent with this regulatory history, the GAO has construed Section 125.8(e) as precluding agencies from imposing the same requirements on protégé firms, but not necessarily prohibiting agencies from favoring offerors that have more impressive experience.[7]

In any case, the court went in a different direction. So, in the wake of SH Synergy, agencies cannot apply the same evaluation criteria to protégés as they do to other offerors. This holding has complicated the government's efforts to strike a balance between supporting protégés and not trying to tilt the balance too far against offerors that do not rely on the SBA's mentor-protégé program.

It is yet to be determined whether such complication will motivate the SBA to make a rule change, or whether future judicial decisions will clarify or whittle away at the holding in SH

Synergy. For now, contractors should expect to see MPJVs receive significant advantages in request-for-proposal evaluation schemes.

Second, the court ruled that the GSA's decision not to evaluate price at the contract level violated Title 41 of the U.S. Code, Section 3306(c), a procurement statute that requires agencies to "include cost or price to the Federal Government as an evaluation factor that must be considered in the evaluation of proposals," except if "an executive agency issues a solicitation for one or more contracts for services to be acquired on an annual rate basis." In that case, consideration of price can be deferred for competition at the task order level.

The GSA controversially interpreted the phrase "on an annual rate basis" as applying not only to labor-hour and time-and-materials contracts, but also to fixed-price contracts. The GSA justified this expansive interpretation by arguing that hourly rates are embedded in prices proposed for fixed-price contracts.

The court rejected this interpretation and held that the exception allows deferring consideration of price only in the case of time-and-materials and labor-hour task orders. Because a significant anticipated advantage of Polaris, and other governmentwide acquisition contracts, is that agencies can award fixed-price task orders, this holding will likely prompt the GSA to introduce price evaluation factors to future governmentwide acquisition contracts.

As a policy matter, most commentators agree that soliciting pricing at the indefinite-delivery, indefinite-quantity, or IDIQ, level makes little sense. It is difficult for contractors to offer their most competitive pricing at the IDIQ level because the exact nature and quantity of services to be provided are unknown. And requiring contractors to submit generic IDIQ pricing is also a costly burden, especially for small businesses.

Still, the court reiterated that "policy arguments do not trump the plain language of the statute" and that the GSA could not excuse an "unreasonable interpretation of Section 3306(c)(3)'s plain language by relying on policy justifications, no matter how significant the procurement."

The OASIS+ Request For Proposals

In June, the GSA released a request for proposals for the OASIS+ procurement, including proposals for unrestricted contracts,[8] and proposals for total small businesses,[9] and Section 8(a)-certified,[10] HUBZone ,[11] service-disabled veteran-owned[12] and women-owned small businesses.[13]

These requests for proposals contain several changes that appear to be driven by the SH Synergy decision and provide a first glimpse at how agencies that manage governmentwide acquisition contracts might respond to this decision.

Lower Qualifying Project Experience for Protégé Companies

The new requests for proposals make it easier for protégé firms to propose qualifying project experience. Under the draft request, all projects proposed as qualifying projects by small businesses were subject to the same minimum average annual-value threshold.

But under the newly released request for proposals, qualifying projects submitted in the name of a protégé must only meet or exceed 50% of the minimum average annual value specified within an attachment to the request.

"Cost/Price" Added as an Evaluation Factor

The newly released request for proposals added price as an evaluation factor. Cost/Price submissions are now mandatory requirements to be eligible for award.

As for direct rates, offerors will be required only to include ceiling rates for subject-matter expert positions for each labor category. Offerors will also have to propose indirect-cost rates based on their most current Defense Contract Audit Agency, Defense Contract Management Agency, or cognizant federal agency-approved forward pricing rate agreements, forward pricing rate recommendations, or provisional billing rates or indirect cost rates generated by an adequate accounting system.

The GSA will evaluate offeror pricing for reasonableness only and on an acceptable/nonacceptable basis.

These changes are certainly the direct result of the holding in SH Synergy — i.e., the court's expansive interpretation of Section 125.8(e) and its narrow interpretation of Section 3306(c). It will be interesting to see if there is any pre-award protest activity for OASIS+, perhaps arguing that the agency did not go far enough to implement SH Synergy or, perhaps, arguing that the agency went too far.

If the past is any guide, expect fireworks — CIO-SP4 drew more than 300 protests! As the pool of potential contract awards shrinks while the value of those remaining vehicles increases, contractors may feel the need to protest aggressively, lest they miss out on being a prime for the next decade.

Other Potential Impacts of SH Synergy

The court's interpretation of Section 125.8(e) could complicate agencies' efforts to strike a fair balance between giving protégé companies a leg up while not unfairly disadvantaging other competitors, such as other small businesses or joint ventures composed of two small businesses.

An earlier version of the Polaris solicitation arguably tilted too far in favor of MPJVs by not requiring the protégé company to submit any past-performance references, thus allowing MPJVs with a large business to max out their scores by relying entirely on the experience of the large mentor.

The GSA ultimately took corrective action in response to several GAO bid protests challenging that scheme, and adopted the current version of the Polaris solicitations. But, as we've seen, the court found the GSA swung the pendulum too far in the other direction, so if the agency goes forward with Polaris, it will have to revise the solicitation to benefit proteges in accordance with the SH Synergy holding.

This is all unless the SBA makes a regulatory change to Section 125.8(e), either codifying SH Synergy or reversing it, depending on what the SBA believes to be good policy.

The court's ruling that federal procurement law prohibits agencies from deferring consideration of price from the IDIQ level to the task-order level in the case of cost-plus or fixed price task orders is especially consequential.

This holding eliminates a streamlining tool that could have reduced the cost of submitting

proposals and potentially increased competition at the task order level. Additionally, since this holding hinges on an interpretation of federal statute, it cannot be undone through a rule change but can be reversed only by Congress.

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[1] https://washingtontechnology.com/contracts/2022/10/unhappy-bidders-claim-cio-sp4-unfairly-favors-large-businesses/378352/.

[2] https://buy.gsa.gov/interact/community/196/activity-feed/post/a5e4ec7f-7496-4143-bdc5-1ee62cc20157/GSA_Releases_Final_OASIS_Request_for_Proposals.

[3] https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2022cv1466-45-0.

[4] https://buy.gsa.gov/interact/community/196/activity-feed.

[5] https://www.federalregister.gov/documents/2020/10/16/2020-19428/consolidation-of-mentor-protg-programs-and-other-government-contracting-amendments.

[6] The change from the Final Rule to Section 125.8 is discussed in Small Business Administration, Final Rule: Consolidation of Mentor-Protégé Programs and Other Government Contracting Amendments, 85 Fed. Reg. 66146, 66167-66168, Oct. 16, 2020 (effective Nov. 16, 2020).

[7] For instance, in Innovate Now, LLC, B-419546 (Apr. 26, 2021), GAO determined that the request for proposals violated section 125.8(e) by requiring all firms, including the protégé firm, to submit at least one work sample demonstrating that they have previously performed a cost-reimbursement type federal government contract as the prime contractor for a period of at least six months during the last five years. GAO concluded that the request for proposals impermissibly required "[a]ll offerors-including the protégé member of a mentor-protégé joint venture-must meet exactly the same evaluation requirements." In contrast to that solicitation, the Polaris request for proposals subjected protégés to a lower requirement than other firms—protégés were required to submit only one experience, as opposed to three.

[8] https://sam.gov/opp/55f9e1880c0749d38ba0dec938d0f3b4/view.

[9] https://sam.gov/opp/c21bf55f64574cf68f851bc6d32368b6/view.

[10] https://sam.gov/opp/424bfae9aaf0404183bbfd209b547516/view.

[11] https://sam.gov/opp/4d2b4bcc22c54dfcb5d56e334d26b280/view.

[12] https://sam.gov/opp/0d7bd009354c43f499317df7c3facd9a/view.

[13] https://sam.gov/opp/7831fe2848674399851d2334ecfd8dc4/view.