



UNDER CONSTRUCTION

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8(a) Joint Ventures on Federal Construction Projects: More Work, More Hurdles and Likely Less Use

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A good portion of federal government construction contracts are still set aside for or give preferences to certified socio-economic small businesses, such as 8(a), HUBZone, social-economic disadvantaged, veteran or service-disabled veteran. As a result, to obtain these contracts, small and large companies regularly attempt to maximize their competitive advantages through utilization of partnership arrangements, such as joint venture arrangements or Teaming Agreements. A major partnership tool for 8(a) entities is a regulatory sanctioned joint venture arrangement where an actual new entity is created with an ownership interest by both the large and (8)(a) entity. However, recent changes to the small business regulations may make other arrangements, such as Teaming Agreements, more desirable.

Historically, unless the joint venture was with an 8(a) entity or through another mentor-protégée relationship, a partnership between a large and small business concern risked being considered "affiliated." Affiliation exists when the small business concern is so dependent upon the other large business concern that its economic viability would be in jeopardy without such relationship. Such dependency or control can arise through ownership, joint management or the contractual relationship (such as a joint venture).

Moreover, another historical issue was whether or not the small business concern was capable of performing a "significant portion" of the joint venture scope of work with its own resources. The "affiliation" risk to a small business owner was quite real – loss of

certification and/or small business status. Therefore, it was important that the small business concern was able to perform the required percentage of the scope of work within the 8(a) joint venture arrangements.

Now, entering into a joint venture with an 8(a) entity, which historically had regulatory preferences that avoided the "affiliation" risk, is more difficult. Pursuant to 13 C.F.R. §124.513(d), if the small business concern joint venture is an 8(a) entity, then the small business concern must now perform at least 40 percent of the work. This replaces the "significant portion" requirement that previously existed. Of note, this is significantly higher than the 15 percent or 25 percent regulatory requirement that had to be performed by the small business when it subcontracts with a larger business. Although the new rule reduces the required 51 percent profit split to equal the work performed (e.g., the small business concern cannot receive lower than 40 percent of the profits), the new work performance requirement may be a serious hurdle to new partnership arrangements.

A better route may still be a Teaming Agreement. Under this arrangement, the small business concern is the prime contractor and, in construction contracts, must perform at least 15 percent of the work. *See* 13 CFR 124.510. The larger company would then be a subcontractor and could perform up to 85 percent of the work contracted to the small business concern (unless specialty construction work, then it is a 2 percent / 75 percent split). As with the joint venture regulations, the prime contractor is still able to take small business credit for the entire subcontract. The major concern for Teaming Agreements relates to control – however, a large company having too much control leads to "affiliation" anyway and defeats the purpose of the Teaming Agreement.

There are a multitude of other issues that construction companies must consider in developing joint ventures or Teaming Agreements to take advantage of small business certifications. Such issues should be addressed well *before* a bid is submitted. When appropriate to obtain a competitive advantage in federal government contracting, and to avoid successful bid protests from its competitors, a company would be wise to seek assistance from knowledgeable legal counsel who understands the regulatory environment of federal government contracting.

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