



USING JOINT VENTURES TO CAPTURE FEDERAL GOVERNMENT CONTRACTING OPPORTUNITIES

by

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PREFACE

Since January 2012, when we published the first edition of this paper, the regulations that cover the use of joint ventures in federal government contracting have undergone a substantial overhaul. The most recent changes were made in May and July 2016 in two final rules published by the U.S. Small Business Administration (SBA), which is charged with regulating and enforcing the rules on small business participation in federal government contracting.¹ To a large extent, the changes made to the regulations over the years have provided clarity and consistency in how joint ventures can be used by businesses that wish to compete for federal government contracts. But the most significant impact of the changes has been to increase the contracting opportunities that are available to small businesses and the teaming partners that collaborate with them in joint ventures.

As we highlighted in our first edition (and do so again in this edition), a significant advantage in the use of joint ventures as a structure for competing for and being awarded federal government contracts is that they enable businesses or business partnerships to participate as prime contractors under contracts that they otherwise could not, particularly contracts set aside by government agencies to be awarded to small businesses, participants in the SBA's 8(a) Business Development Program (8(a) BD Program), Women-Owned Small Businesses (WOSB's), Economically-Disadvantaged Women-Owned Small Businesses (EDWOSB's), Service-Disabled Veteran-Owned Small Businesses (SDVOSB's) and small businesses certified under the SBA's HUBZone program.

In the first edition introduction, which we repeat below, we noted the recent trend toward contract consolidation. In the intervening years, government initiatives like the adoption of the "category management" strategy by General Services Administration and the Office of Federal Procurement Policy illustrate the momentum toward achieving savings through contract consolidation.

Charged with ensuring that the federal government meets its small business participation goals in the face of ever-increasing contract complexity, the SBA continues to point to joint venture arrangements as one possible relief for the inevitable and ensuing tension between small business participation and fiscal efficiency goals. Indeed, the recent changes to the rules covering joint ventures – from permitting small business joint ventures to perform on contracts other than bundled contracts or contracts of a certain minimum value, to opening up HUBZone joint ventures to non-HUBZone certified business, to the unveiling of new mentor-protégé joint venture arrangements now possible under the SBA's recently established "All Small" Mentor-Protégé Program – clearly are intended to provide small businesses additional incentives to make greater use of joint venture arrangements. Small businesses participating in the federal government market thus would do well to explore joint venture arrangements as they face what is no longer a "new" reality: small businesses must aggressively establish teaming partnerships to stay competitive.

INTRODUCTION – JANUARY 2012

In 2007, the U.S. Department of Defense declared “due in part to shrinking budgets and acquisition resources – contract consolidation is a trend that is likely to continue.”² There can be little dispute that DOD’s prediction has played itself out and that contracts throughout the federal marketplace increasingly have been consolidated and become larger. The U.S. Department of Homeland Security’s (DHS) \$9 billion information technology support services contract - Enterprise Acquisition Gateway for Leading Edge Solutions (EAGLE I) – marketed as a multiple award, indefinite-delivery, indefinite-quantity (IDIQ) contract exemplifies an emerging trend. Although 544 task orders were awarded under the EAGLE I contract between 2006 and 2011, at least three of the task orders nearly topped \$1 billion, while at least sixteen more exceeded \$100 million each. Subsequently, in July 2010, DHS followed up the Eagle I contract with its solicitation for the mammoth \$22 billion EAGLE II IDIQ contract.³

Congressional debate during the Summer of 2011 and ensuing federal legislation to curtail growing federal budget deficits has only increased pressure on federal government agencies to do the same or more “with less.” Therefore, contract consolidation will continue to accelerate and contracts will become larger and more complex, while opportunities for small businesses to single-handedly complete contract tasks or meet all contract requirements will diminish. Moreover, a September 2011 Office of Federal Procurement Policy memorandum requiring government acquisition officers to prepare a “business case analysis” for certain government-wide acquisition contracts, multi-agency contracts, and blanket purchase agreements, foreshadows increased consolidation of multiple contracts not only within a particular federal agency, but across multiple government acquisition offices.⁴

As the U.S. Department of Defense acknowledged, again back in 2007, the growth in size and complexity of government contracts has made teaming “a necessity” in the federal marketplace. Recent changes to regulations by the U.S. Small Business Administration on joint ventures reflect this new reality: small businesses must aggressively establish teaming partners to stay competitive.

This paper discusses the rules on joint ventures that enable businesses to form strategic teaming relationships to secure federal government contracts.

I. TEAMING ARRANGEMENTS

The Federal Acquisition Regulations (“FAR”), the rulebook federal government agencies must follow when they contract for goods and services, explicitly acknowledges and implicitly encourages teaming arrangements:

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 their submission of an offer, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of contractor team arrangements.⁵

Indeed, FAR states that team arrangements may be desirable from both government and industry standpoint in order to enable the companies to (1) complement each other's unique capabilities, and (2) offer the government the best combination of performance, cost, and delivery for the system or product being acquired. Further, FAR acknowledges that teaming arrangements may be particularly appropriate in complex research and development procurements.⁶

The federal contracting rules recognize two kinds of “contractor team arrangements.”⁷ The first kind of team arrangement occurs when companies align horizontally, either as partnerships or joint ventures, to act as the prime contractor.⁸ The second kind of team arrangement occurs when companies align vertically to divide work along a prime contractor-subcontractor chain.⁹

II. ADVANTAGES OF JOINT VENTURES

The federal acquisition rules have a very specific notion of what constitutes a “joint venture,” particularly for purposes of determining whether the joint venture will be considered a small business that can compete for, and be awarded, small business contracts. Specifically, a joint venture is defined as a business association that is intended to last for a limited duration and for specific purpose:

A joint venture for size determination purposes is an association of persons or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out a single specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally.¹⁰

Teaming arrangements, whether they are joint ventures or prime-subcontractor arrangements, offer tangible benefits to government contractors. They enable companies to collectively fulfill contract requirements that they could not fulfill separately. In addition, government agencies routinely factor a bidder's "past performance" – i.e., work done in the past on similar government contracts – in their evaluation of a proposal, and teaming arrangements enable parties to overcome past performance gaps of a particular business. Indeed, in its 2016 overhaul of the regulations covering joint ventures, the SBA made clear its instructions to agencies that they must consider the past performance not only of the joint venture entity itself that is bidding on a contract, but also the past performance of each joint venture partner.¹¹

Although the most prevalent teaming arrangement in federal government contracting is the prime-subcontractor arrangement, joint ventures enable contractors to achieve additional government contracting objectives. Joint venture arrangements:

- Enable companies to spread risks of prime-contracting
- Permit companies to leverage their combined capital
- Allow all parties to have a voice and some degree of control over how the contract is performed and managed
- Enable parties to share in profits of the entire project
- Enable parties to develop direct relationships with the government agency contracting officials
- Enable small businesses to offer bonding capacity of larger companies

Typically, only a prime contractor has privity of contract. That is, the prime contractor – and not any of the subcontractors – is a party to the contract with the government agency and only the prime contractor has an enforceable right against the government for the benefits under the government contract. A subcontractor, in turn, typically only has privity of contract under a subcontracting agreement with the prime contractor. Therefore, when a subcontractor has a dispute with a prime contractor over payment for services, the subcontractor usually cannot seek payment directly from the federal government. Joint venture arrangements, however, enable all teaming partners to have "privity" of contract with the contracting government agency.

In addition, as described further below, federal regulations enable joint venture partners to bid for contracts that collectively or separately they might not otherwise be eligible to compete for. For example, the joint venture rules offer unique and rare opportunities for large businesses to perform work as prime contractors on 8(a), WOSB, SDVOSB or HUBZone set-aside contracts as part of a mentor-protégé joint venture under one of the SBA's mentor-protégé programs. And small businesses that do not qualify as 8(a), WOSB, SDVOSB or HUBZone businesses, nevertheless have opportunities to perform work under contracts set aside for those types of small businesses if they are partners in joint ventures with qualifying small businesses.

A. OVERCOMING AFFILIATION WITH CERTAIN JOINT VENTURES

Government contracting officers routinely set aside contracts that are to be performed by small businesses or include small business participation requirements in their contract solicitations. When they do, they also designate the size standard to be used to determine what constitutes a small business for purposes of these small business set-aside contracts and small business participation requirements. The small business size standards depend on the particular industry in which the government goods or services will be procured (typically as set forth in the North American Industry Classification System or “NAICS”). The size standard itself is normally expressed as a numerical ceiling – the maximum revenue or the maximum number of employees – that represents the largest size that a business may have to be considered a “small business” for purposes of the procurement.

Under certain circumstances, joint venture partners may enjoy all the benefits of a joint venture arrangement, and still compete for contracts that are set aside for small businesses or that have small business participation requirements, even though the combined size of the joint venture parties exceeds the small business size standard set by a government agency.

1. General Rule on Affiliation of Joint Venture Partners

It should be noted that as a general rule, joint venture partners are deemed to be “affiliated” for purposes of a size standard that is set for a federal government small business contract or contract requirement.¹² That is, as affiliates, the joint venture partners are required to have their revenues and employee numbers combined in order to determine if the joint venture should be considered a “small business” for any small business contract or requirements.¹³ Consequently, in the absence of any exceptions to this affiliation rule, joint ventures that include large businesses that exceed the size standard for a contract, as well as joint ventures that include small businesses that individually may not exceed the size standard but that collectively do, would be ineligible for small business prime contracts.

However, there is, indeed, an exception to this general affiliation rule that applies to three categories of joint ventures. One category includes joint ventures in which each joint venture partner is a small business. These joint ventures will be referred to in this paper as “Small Business Joint Ventures.” A second category includes joint ventures that comprise approved mentors and protégés in the SBA’s 8(a) Business Development Program (“8(a) BD Program”). These joint ventures will be referred to in this paper as “8(a) Mentor-Protégé Joint Ventures.” A third category includes joint ventures made up of approved mentors and protégés under the SBA’s “All Small” mentor-protégé program. These joint ventures will be referred to in this paper as “All Small Mentor-Protégé Joint Ventures.” Joint ventures in all three categories are considered to be a small business not only for purposes of prime contracts, but also for subcontracts.¹⁴

2. General Prerequisites For Exception To Joint Venture Affiliation

Regardless of which of the three categories they fall under, all joint ventures, as well as the partners that comprise them, must meet certain conditions to be eligible for the exception to joint venture affiliation. The consequence of not meeting these conditions, described directly below, is that the joint venture partners will be deemed to be affiliated.

a. The Joint Venture Must Comply With Contract Award Limitations

The SBA's rules generally anticipate that joint ventures will be for limited purposes and of limited duration. More specifically, the rules state that

[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.¹⁵

Consequently, a joint venture may not be awarded more than three contracts over a two-year period without the partners being deemed affiliated.¹⁶

The SBA regulations provide very specific timing instructions on how this limitation should be applied. The two-year period begins to run "starting from the date of the award of the first contract."¹⁷ Once an initial contract is awarded to a joint venture and the two-year period begins, the time for determining compliance with the three-award limitation is on the "date of initial offer including price." In other words, the time for counting the three awards is as of the date the joint venture submits its bid or proposal. Indeed, the regulation explains that a joint venture with two or fewer contract awards at the time it submits additional bids may ultimately be awarded more than three contracts without the SBA finding affiliation since at the time the bids for each contract were offered, the joint venture only had two contract awards.¹⁸

In addition, the amended SBA regulation allows the same parties to a joint venture that has been awarded three contracts to form a second (and then third . . .) additional joint venture, which in turn is potentially eligible to be awarded up to three contracts. The regulations, however, acknowledge that at some point a "longstanding" inter-dependent relationship will lead to a finding that the joint venture partners are affiliated.¹⁹

b. The Joint Venture Agreement Must Be In Writing and the Joint Venture Must Be Identifiable

The SBA rules impose two prerequisites to the exception to joint venture affiliation that are aimed at making joint ventures readily identifiable for purposes of tracking the awards that are made to them. First, the SBA rules require that the agreement by the venturers to form the joint venture to be in writing. Second, they require the joint venture “to do business under its own name” (as opposed to under the name of one of the joint venturers) and to be identified in the System for Award Management (SAM) as a joint venture.²⁰

c. The Joint Venture May Be A Partnership or Unpopulated Separate Legal Entity

The SBA rule excepting joint ventures from affiliation states that a joint venture may be in the form of a “formal or informal partnership.”²¹ Thus, the SBA will recognize what is commonly referred to as a “contractual joint venture,” in which parties sign a contract to perform work together as a partnership without setting up a separate legal entity and in which profits or losses are allocated among the parties. Moreover, the recognition of informal partnerships reflects an understanding that joint ventures may include all forms of such partnerships, regardless of whether they meet formal requirements relating to liability limitations under state law or are of the type required to be registered with a state.

The SBA regulations also permit a joint venture to be formed as a separate legal entity, such as a limited liability company, if it meets one condition. If the joint venture is formed as a separate legal entity, it may not be populated with its own separate employees who are intended to perform work under the contracts awarded to the joint venture. The rules allow a limited exception that permits a joint venture that is set up as a separate legal entity to hire its own employees only if they are hired to perform administrative functions.²²

B. EXPANDED OPPORTUNITIES FOR SMALL BUSINESSES JOINT VENTURE PARTNERS

As stated, one category of joint ventures excepted from affiliation under the SBA rules are Small Business Joint Ventures – joint ventures made up of two or more businesses, each of which is small under the size standard assigned to the prospective government contract.²³

Small businesses that make up Small Business Joint Ventures potentially have an opportunity to bid on, and work under, small business contracts that they otherwise would not be eligible to in two ways. First, the affiliation exception itself provides an opportunity for small businesses to join together as partners or to form a separate legal entity and perform under a small business contract when, collectively, the partnership or entity exceeds a contract’s small business size standard.

Second, although not a direct by-product of the joint venture affiliation exception but rather a result of the rules that apply to these Small Business Joint Ventures, opportunities are available *to small businesses venturers that are not 8(a), WOSB, SDVOSB or HUBZone businesses to nevertheless perform as prime contractors under contracts set aside for 8(a), WOSB, SDVOSB, or HUBZone small businesses* as long as they are part of a small business joint venture that includes a qualifying venturer.

1. Affiliation Exception for Small Business Joint Ventures

As a technical matter, apart from the general prerequisites for the application of the exception to joint venture affiliation discussed above, the only requirement for the exception to joint venture affiliation to apply to Small Business Joint Ventures is that all the businesses in the joint venture must be small businesses under the contract size standard. In other words, as long as each venturer is a small business, the joint venture partnership or entity will be considered a small business.

Therefore, although, as discussed below, the SBA rules impose additional conditions on Small Business Joint Ventures that wish to compete for and perform under socio-economic set-aside contracts (e.g., 8(a), WOSB, SDVOSB or HUBZone contracts), as a technical matter, compliance with these additional conditions impacts a Small Business Joint Venture's eligibility to perform under the socio-economic set-aside contract but not the Small Business Joint Venture's status as a small business under the contract's size standard.

2. Different Types of Small Business Joint Ventures

a. Small Business-Small Business Joint Ventures

Under the SBA rules, a joint venture made up of businesses that each are considered small under the size standard set for a contract may compete for, and be awarded, a small business set-aside contract.²⁴

An important distinction between these "small business-small business" joint ventures eligible to compete for small-business set-asides and the remaining small business joint ventures identified below that qualify for contracts set aside for businesses with a socio-economic status (e.g., 8(a), WOSB, SDVOSB, or HUBZone small businesses) concerns the requirements imposed on the joint venture agreements. More specifically, while *a joint venture agreement between two or more businesses that individually qualify as small does not have to be in any specific form or contain any specific conditions in order for the joint venture to qualify as a small business*,²⁵ a joint venture agreement for a joint venture eligible for an 8(a), WOSB, SDVOSB, or HUBZone contract, on the other hand, is required to comply with detailed and stringent requirements.

b. 8(a)-Small Business Joint Ventures

A small business in the SBA's 8(a) BD Program may enter into a joint venture agreement with one or more small businesses to perform work under an 8(a) set-aside contract, regardless of whether the other small businesses are 8(a) BD Program participants.²⁶

An important and unique aspect of these joint ventures is that they enable a small business that does not participate in the 8(a) BD Program to nevertheless compete for, and perform work as a prime contractor under, an 8(a) set-aside contract.

The SBA must approve the joint venture agreement *prior to* an award of an 8(a) contract to the joint venture.²⁷ Moreover, even before, the SBA must first approve of the joint venture before the parties enter into the joint venture agreement; and a joint venture agreement with an 8(a) BD Program participant to perform an 8(a) contract is permissible only if an 8(a) business lacks the necessary capacity to perform the contract on its own and the joint venture agreement is fair, equitable, and will be of substantial benefit to the 8(a) business.²⁸ These prerequisites are absent in the rules applicable to the small business joint ventures mentioned below that are eligible for other socio-economic set-aside contracts (e.g., WOSB, SDVOSB or HUBZone contracts) regardless of whether the qualifying venturer has the capacity to perform on its own or will benefit substantially.

In addition, the joint venture agreement between the 8(a) BD Program participant and the other small businesses to perform an 8(a) contract must comply with twelve (12) separate requirements, including that the joint venture agreement: state the purpose of the joint venture; designate the 8(a) BD Program participant as the managing venturer and an employee of the 8(a) participant as the project manager for performance of the contract; and state that the 8(a) business owns at least 51% of the entity if the joint venture is formed as a separate legal entity like an LLC.²⁹

The joint venture partners to an 8(a)-small business joint venture must also comply with "performance of work" requirements. One of these requirements is that the 8(a) partners to the joint venture must perform at least forty percent (40%) of the work under the 8(a) contract awarded to the joint venture.³⁰ The 8(a) BD Program participant partner is required to submit, prior to the performance of any 8(a) contract, a written certification to the contracting officer and the SBA, signed by an authorized official of each partner to the joint venture, stating that the joint venture agreement complies with applicable requirements and that the parties will perform the contract in accordance with the joint venture agreement and performance of work requirements.³¹

c. WOSB-Small Business Joint Ventures

A joint venture comprised of businesses that are each small under the size standard of the contract in which at least one venturer is a WOSB or EDWOSB, may compete for a WOSB or EDWOSB set-aside contract, respectively.³²

Thus, small businesses that are not WOSB or EDWOSB businesses can perform as prime contractors under WOSB or EDWOSB set-aside contracts when they are part of a small business joint venture that includes a WOSB or EDWOSB.

The EDWOB or WOSB partner must be designated in SAM as an EWOSB or WOSB.

In addition, the joint venture agreement between the WOSB or EDWOSB participant and the other small businesses must comply with twelve (12) separate requirements, including that the joint venture agreement: state the purpose of the joint venture; designate the WOSB partner as the managing venturer and an employee of the WOSB partner as the project manager for performance of the contract; and state that WOSB owns at least 51% of the entity if the joint venture is formed as a separate legal entity like an LLC.³³

The joint venture partners to WOSB-small business joint venture must also comply with “performance of work” requirements. One of these requirements is that the WOSB must perform at least forty percent (40%) of the work under the awarded WOSB contract.³⁴ The WOSB partner is required to submit, prior to the performance of any WOSB contract, a written certification to the contracting officer and the SBA, signed by an authorized official of each partner to the joint venture, stating that the joint venture agreement complies with applicable requirements and that the parties will perform the contract in accordance with the joint venture agreement and performance of work requirements.³⁵

d. SDVOSB-Small Business Joint Ventures

Joint ventures may also compete for contracts set aside for SDVOSB’s. The joint venture must include at least one SDVOSB and all joint venture partners must qualify as a small business under the size standards for the contract.³⁶

Small businesses that are not SDVOSB’s can perform as prime contractors under SDVOSB set-aside contracts when they are part of a small business joint venture that includes an SDVOSB.

In addition, the joint venture agreement between the SDVOSB participant and the other small businesses must comply with twelve (12) separate requirements, including that the joint venture agreement: state the purpose of the joint venture; designate the SDVOSB partner as

the managing venturer and an employee of the SDVOSB partner as the project manager for performance of the contract; and state that SDVOSB owns at least 51% of the entity if the joint venture is formed as a separate legal entity like an LLC.³⁷

The joint venture partners to SDVOSB-small business joint venture must also comply with “performance of work” requirements. One of these requirements is that the SDVOSB must perform at least forty percent (40%) of the work under the awarded SDVOSB contract.³⁸ The SDVOSB partner is required to submit, prior to the performance of any SDVOSB contract, a written certification to the contracting officer and the SBA, signed by an authorized official of each partner to the joint venture, stating that the joint venture agreement complies with applicable requirements and that the parties will perform the contract in accordance with the joint venture agreement and performance of work requirements.³⁹

e. HUBZone-Small Business Joint Ventures

A joint venture made up of businesses that are each small under the size standard of the contract in which at least one partner is a HUBZone small business may compete for a HUBZone small business set-aside contract.⁴⁰

Small businesses that are not HUBZone businesses can perform as prime contractors under a HUBZone set-aside contract when they are part of a small business joint venture that includes a HUBZone small business.

In addition, the joint venture agreement between the HUBZone participant and the other small businesses must comply with twelve (12) separate requirements, including that the joint venture agreement: state the purpose of the joint venture; designate the HUBZone partner as the managing venturer and an employee of the HUBZone partner as the project manager for performance of the contract; and state that HUBZone business owns at least 51% of the entity if the joint venture is formed as a separate legal entity like an LLC.⁴¹

The joint venture partners to HUBZone-small business joint venture must also comply with performance of work requirements. One of these requirements is that the HUBZone small business must perform at least forty percent (40%) of the work under the awarded HUBZone contract.⁴² The HUBZone partner is required to submit, prior to the performance of any HUBZone contract, a written certification to the contracting officer and the SBA, signed by an authorized official of each partner to the joint venture, stating that the joint venture agreement complies with applicable requirements and that the parties will perform the contract in accordance with the joint venture agreement and performance of work requirements.⁴³

C. EXPANDED OPPORTUNITIES FOR MENTOR-PROTÉGÉ JOINT VENTURE PARTNERS

1. 8(a) Mentor-Protégé Joint Ventures

The second category of joint ventures exempt from general joint venture affiliation includes joint ventures made up of companies approved by the SBA to be mentors and protégé's in the SBA's 8(a) Mentor-Protégé Program.

The SBA's Mentor-Protégé Program under the 8(a) BD Program enables 8(a) participants to obtain technical and management assistance, certain financial assistance, and prime contracting opportunities from approved "mentors," *which themselves do not have to be small businesses or owned by socially or economically disadvantaged individuals.*

Under the SBA rules, "[t]wo firms approved by SBA to be a mentor and protégé " under the SBA's 8(a) Mentor-Protégé Program "may joint venture as a small business for any Federal government prime or subcontract" as long as conditions discussed below are met.⁴⁴ Thus, these 8(a) Mentor-Protégé Joint Ventures are eligible to perform under small business set-aside contracts and 8(a) set-aside contracts, as well as contracts set aside for WOSB, SDVOSB or HUBZone small business when the joint venture includes a qualifying partner.⁴⁵

Consequently, 8(a) Mentor-Protégé Joint Ventures offer a structure for expanded opportunities to businesses that are not 8(a), WOSB, SDVOSB, or HUBZone businesses to perform under contracts set aside for small businesses that are. In addition, the exception to affiliation for joint ventures participating in the SBA's 8(a) Mentor-Protégé Program makes possible particularly rare opportunities for a large business – as a mentor – to compete for, and be awarded, federal government contracts set aside for small businesses.

a. Affiliation Exception For 8(a) Mentor-Protégé Joint Ventures

Apart from the general prerequisites for the application of the exception to joint venture affiliation that are described above, to be eligible for the exception to affiliation that applies to 8(a) Mentor-Protégé Joint Ventures, the joint venture must meet several other requirements described below.

The joint venture must be made up of the "[t]wo firms approved by the SBA to be mentor and protégé" under the 8(a) BD Program.⁴⁶

Consequently, a joint venture made up of an 8(a) mentor and protégé and an additional third party will not be eligible for this exception to affiliation.

In addition, the protégé must be small under the size standard set for the contract.⁴⁷ Also, for purposes of any 8(a) sole source requirements, the 8(a) protégé must not have exceeded the limit on prior contract awards that applies to 8(a) sole source contracts.⁴⁸

To be eligible for the exclusion from affiliation for an 8(a) contract award, the 8(a) Mentor-Protégé Joint Venture must: (1) obtain the SBA's approval of the mentor-protégé agreement before the joint venture submits an offer on an 8(a) contract;⁴⁹ (2) obtain the SBA's approval of the joint venture agreement before the joint venture is awarded an 8(a) contract;⁵⁰ and (3) enter into a joint venture agreement that contains twelve (12) required provisions, including a statement of the purpose of the joint venture; designations of the 8(a) partner as the managing venturer and an employee of the 8(a) partner as the project manager for performance of the contract; and a statement that the 8(a) partner owns at least 51% of the entity if the joint venture is formed as a separate legal entity like an LLC.⁵¹

Besides the conditions above for the application of the joint venture affiliation exception, 8(a) Mentor-Protégé Joint Ventures that wish to perform under 8(a) contracts must also comply with two additional requirements. First, they must meet performance of work requirements, including that the 8(a) partner perform at least 40% of the work done by the joint venture, are conditions on performance by the 8(a) Mentor-Protégé Joint Venture under the 8(a) contract.⁵² Second, the 8(a) BD Program participant partner is required to submit, prior to the performance of any 8(a) contract, a written certification to the contracting officer and the SBA, signed by an authorized official of each partner to the joint venture, stating that the joint venture agreement complies with applicable requirements and that the parties will perform the contract in accordance with the joint venture agreement and performance of work requirements.⁵³

As for awards of non-8(a) contracts (e.g., small business, HUBZone set-aside contracts), although the SBA must approve the mentor-protégé agreement before an 8(a) Mentor-Protégé Joint Venture submits an offer in order for the joint venture affiliation exception to apply,⁵⁴ the 8(a) Mentor-Protégé Joint Venture is not required to obtain the SBA's approval of the joint venture agreement prior to contract award as a condition for exclusion from affiliation.⁵⁵ However, the following two requirements are a condition for the application of the joint venture affiliation exception. First, even though prior SBA approval is not necessary, the joint venture agreement must nevertheless contain twelve (12) required provisions including ones that: state the purpose of the joint venture; designate the 8(a) partner as the managing venturer and an employee of the 8(a) partner as the project manager for performance of the contract; and state that the 8(a) partner owns at least 51% of the entity if the joint venture is formed as a separate legal entity like an LLC.⁵⁶ Second, the joint venture must comply with performance of work requirements, including that the 8(a) partner perform at least 40% of the work done by the joint venture.⁵⁷

Lastly, to remain eligible for the exception to affiliation, after the performance of either an 8(a) or a non-8(a) contract, the 8(a) protégé must submit a report to the SBA district office explaining how applicable performance of work requirements were met.⁵⁸

2. “All Small” Mentor-Protégé Joint Ventures

The third category of joint ventures exempt from the joint venture affiliation rule includes joint ventures made up of mentors and protégés approved by the SBA for its “All Small” Mentor-Protégé Program.

The SBA’s “All Small” Mentor Protégé Program is modelled after the SBA’s 8(a) Mentor-Protégé Program and offers non-8(a) small businesses, including WOSB, SDVOSB and HUBZone small businesses, the opportunity to obtain business development and financial assistance from SBA-approved mentors, which as under the SBA’s 8(a) Mentor-Protégé Program, do not have to be small businesses. All Small Mentor-Protégé Joint Ventures are eligible to perform under small-business set aside prime contracts and, where the protégé is a WOSB, SDVOSB or HUBZone small business, under WOSB, SDVOSB or HUBZone set-aside prime contracts.⁵⁹

Thus, like 8(a) Mentor-Protégé Joint Ventures, All Small Mentor-Protégé Joint Ventures enable businesses that are not 8(a), WOSB, SDVOSB, or HUBZone businesses to perform under contracts that are set-aside for small businesses that are. And, again, also like 8(a) Mentor-Protégé Joint Ventures, All Small Mentor Protégé Joint Ventures provide rare opportunities for a large business – as a mentor – to compete for, and be awarded, contracts set aside for small businesses by virtue of the exception to joint venture affiliation.

a. Affiliation Exception For All Small Mentor-Protégé Joint Ventures

In addition to the general prerequisites for the application of the affiliation exception for joint ventures described above, other conditions described below must be met in order for All Small Mentor-Protégé Joint Ventures to be eligible for the exception to joint venture affiliation.

The joint venture must be made up only of the two firms approved by the SBA for the All Small Mentor-Protégé Program.⁶⁰ In addition, in order for the joint venture to receive the exclusion from affiliation, the SBA must approve the mentor-protégé agreement before the two firms may submit an offer as a joint venture on a particular government prime contract or subcontract.⁶¹

Consequently, as with 8(a) Mentor-Protégé Joint Ventures, joint ventures made up of an additional third party other than the All Small mentor or protégé will not be eligible for the exception to affiliation.

Also, the protégé must be small under the size standard of the government contract.⁶²

Lastly, All Small Mentor-Protégé Joint Ventures must meet three additional requirements for the exception to joint venture affiliation to apply. First, the joint venture agreement must contain twelve (12) required provisions, including provisions that: state the purpose of the joint venture; designate the small business protégé or qualifying WOSB, SDVOSB or HUBZone protégé as the managing venturer and an employee of the small business or qualifying protégé as the project manager for performance of the contract; and state that the small business, WOSB, SDVOSB or HUBZone protégé owns at least 51% of the entity if the joint venture is formed as a separate legal entity like an LLC.⁶³

Second, the joint venture partners must comply with the performance of work requirements, including that the small business protégé or the WOSB, SDVOSB or HUBZone business protégés perform at least 40% of the work performed by the joint venture.⁶⁴

Third, although All Small Mentor-Protégé Joint Ventures are not required to submit their joint venture agreements to the SBA for approval, the small business protégé, including any WOSB, SDVOSB, or HUBZone protégé, is required to submit, prior to the performance of any small business, WOSB, SDVOSB or HUBZone contract, a written certification to the contracting officer and the SBA, signed by an authorized official of each partner to the joint venture, stating that the joint venture agreement complies with applicable requirements and that the parties will perform the contract in accordance with the joint venture agreement and performance of work requirements.⁶⁵

D. EXPANDED OPPORTUNITIES FOR SDB JOINT VENTURE PARTNERS

Under certain conditions, a joint venture may be able to enjoy benefits typically enjoyed by businesses certified as small disadvantaged businesses (SDB's) by the SBA, such as price evaluations, evaluation factors and subfactors, and monetary subcontracting incentives. To qualify as an SDB business for these purposes, at least one of the joint venture partners must be SDB-certified by the SBA or must have submitted an application for certification and not received a negative determination. In addition, the SDB partner must be the manager of the joint venture and the employee of the SDB must be the project manager responsible for contract performance. Lastly, the joint venture must perform any work required of SDB offerors and the SDB partner must perform a significant portion of the contract.⁶⁶

However, unless the joint venture falls within one of the three categories of joint ventures eligible for the exception to joint venture affiliation – i.e., it is a Small Business Joint Venture, an 8(a) Mentor-Protégé Joint Venture, or an All Small Mentor-Protégé Joint Venture – the parties to the joint venture will be deemed affiliated and their revenues and employee numbers will be combined for purposes of the size standards set for the contract.⁶⁷

E. REQUIREMENTS ON PERFORMANCE OF WORK AND JOINT VENTURE AGREEMENTS

As stated above, the SBA's rules require all 8(a) Mentor-Protégé Joint Ventures and All Small Mentor-Protégé Joint Ventures, as well as Small Business Joint Ventures that wish to perform under contracts set aside for WOSB, SDVOSB or HUBZone set-aside contracts, to meet very specific performance of work requirements and to enter into joint venture agreements that contain very specific provision that cover a wide range of issues, including allocation of profits, establishment of bank accounts, and retention of accounting and administrative records. These requirements are a condition for performing work under the small business contracts, and in some instances are also a condition for remaining eligible for the exception to joint venture affiliation.

A review of each of these requirements is outside the scope of this paper. Nevertheless, *joint venturers should examine the SBA's rules carefully to make sure their work-allocations and joint venture agreements are compliant with the SBA's rules.*

III. OTHER CONSIDERATIONS

The federal regulations on joint ventures pave the way for additional procurement opportunities for companies that seek to maximize their selling power in an increasingly competitive federal marketplace.

As with other teaming arrangements, potential joint venture partners should carefully consider bonding capacity, financial resources, past performance, and technical proficiency and expertise of their potential partners.

However, as a practical matter, the nature of a government contracting joint venture arrangement – with highly specific shared management, work sharing, risk sharing, and profit sharing requirements – may require parties to cooperate and collaborate more effectively than they might otherwise under a prime-subcontractor arrangement, or risk a failed endeavor. Consequently, other factors such as company culture, and management strength and style may take on greater significance and potentially can be sources of conflict. The most successful joint ventures, therefore, will have a shared mission that is meticulously aligned with the goals of each of the joint venture partners, as well as the requirements of the government contracts that they compete for. Carefully drafted joint venture agreements, along with cohesive contract management strategies and tools, and sufficient administrative support will go a long way towards the successful attainment of the joint venture parties' objectives.

ENDNOTES

¹ 81 Fed. Reg. 34243; 81 Fed. Reg. 48558.

² Guidebook For Facilitating Small Business Teaming Arrangements, U.S. Department of Defense, September 2007.

³ Office of Procurement Operations Director Soraya Correa purportedly stated the total ceiling for the Unrestricted and Small Business tracks will be \$22 billion. Other federal agencies have followed the same approach for contracting out IT support services, such as the United States Department of Justice, which in March 2011 awarded its \$1.1 billion ITSS-4 contract under an IDIQ, and the U.S. Food and Drug Administration, which in March 2009 awarded its \$2 billion ELMS contract under an IDIQ.

⁴ Office of Federal Procurement Policy (OFPP), Memorandum For Chief Acquisition Officers Senior Procurement Executives Re: Development, Review and Approval of Business Cases For Certain Interagency and Agency-Specific Acquisitions (Sept. 29, 2011). OFPP Administrator Daniel Gordon subsequently explained: "Too often in the past, agency spending . . . was fragmented across multiple departments, programs, and components, which means that agencies often spent time writing hundreds of separate contracts, with pricing that varies widely. The result is a waste of limited staff time and energy, and prices that are not as good as they should be." Jill R. Aitoro, "White House pushes contract consolidation," *Washington Business Journal* (October 7, 2011).

⁵ FAR 9.603.

⁶ FAR 9.602.

⁷ FAR 9.601.

⁸ FAR 9.601(1).

⁹ FAR 9.601(2).

¹⁰ FAR 19.101(7)(i).

¹¹ 13 CFR 125.8(e), 125.18(b)(5), 126.616(f), and 127.506(f); see also 13 CFR 124.513(f).

¹² 13 CFR 121.103(h)(2).

¹³ 13 CFR 121.103(a)(6).

¹⁴ 13 CFR 121.103(h)(3)(i), (ii), (iii).

¹⁵ 13 CFR 121.103(h) (emphasis added).

¹⁶ 13 CFR 121.103(h).

¹⁷ 13 CFR 121.103(h).

¹⁸ 13 CFR 121.103(h).

¹⁹ 13 CFR 121.103(h).

²⁰ 13 CFR 121.103(h).

²¹ 13 CFR 121.103(h).

²² 13 CFR 121.103(h).

²³ 13 CFR 121.103(h)(3)(i).

²⁴ 13 CFR 125.8(a).

²⁵ 13 CFR 125.8(b)(1).

²⁶ 13 CFR 124.513(a)(1).

²⁷ 13 CFR 124.513(e)(1).

²⁸ 13 CFR 124.513(a)(1), (2).

²⁹ 13 CFR 124.513(c).

³⁰ 13 CFR 124.513(d).

³¹ 13 CFR 124.513(j)

³² 13 CFR 127.506(a)(1).

³³ 13 CFR 127.506(c).

³⁴ 13 CFR 127.506(d).

³⁵ 13 CFR 127.506(e).

³⁶ 13 CFR 125.18(b)(1)(i).

³⁷ 13 CFR 125.18(b)(2).

³⁸ 13 CFR 125.18(b)(3).

³⁹ 13 CFR 125.18(b)(4).

⁴⁰ 13 CFR 126.616(b)(1).

⁴¹ 13 CFR 126.616(c).

⁴² 13 CFR 126.616(d).

⁴³ 13 CFR 126.616(e).

⁴⁴ 13 CFR 121.103(h)(3)(iii).

⁴⁵ 13 CFR 121.103(h)(3)(iii); 13 CFR 124.513(b)(2); 13 CFR 125.8(b)(2); 13 CFR 125.18(b)(1)(ii); 13 CFR 127.506(a)(2); 13 CFR 126.616(a); 13 CFR 125.18(b)(ii).

⁴⁶ 13 CFR 121.103(h)(3)(iii).

⁴⁷ 13 CFR 121.103(h)(3)(iii).

⁴⁸ 13 CFR 121.103(h)(3)(iii).

⁴⁹ 13 CFR 124.520(d)(1)(i).

⁵⁰ 13 CFR 121.103(h)(3)(iii); *see also* 13 CFR 124.513(e)(1).

⁵¹ 13 CFR 124.520(d)(1)(ii); 13 CFR 124.513(d).

⁵² 13 CFR 124.513(d).

⁵³ 13 CFR 124.513(j).

⁵⁴ 13 CFR 124.520(d)(1)(i).

⁵⁵ 13 CFR 121.103(h)(3)(iii).

⁵⁶ 13 CFR 121.103(h)(3)(iii); 13 CFR 124.513(c).

⁵⁷ 13 CFR 121.103(h)(3)(iii); 13 CFR 124.513(d).

⁵⁸ 13 CFR 121.103(h)(3)(iii).

⁵⁹ 13 CFR 121.103(h)(3)(ii); 13 CFR 125.8(b)(2); 13 CFR 125.18(b)(1)(ii); 13 CFR 127.506(a)(2); 13 CFR 126.616(a).

⁶⁰ 13 CFR 121.105(h)(3)(ii).

⁶¹ 13 CFR 125.9(d)(1)(i).

⁶² 13 CFR 121.103(h)(3)(ii).

⁶³ 13 CFR 121.103(h)(3)(ii); 13 CFR 125.8(b)(2); 13 CFR 125.9(d)(1)(ii); 13 CFR 125.18(b)(2); 13 CFR 126.616(c); 13 CFR 127.506(c).

⁶⁴ 13 CFR 121.103(h)(3)(ii); 13 CFR 125.8(c); 13 CFR 125.9(d)(1)(ii); 13 CFR 125.18(b)(3); 13 CFR 126.616(d); 13 CFR 127.506(d).

⁶⁵ 13 CFR 125.8(c); 13 CFR 125.9(d)(1)(ii); see also 13 CFR 125.18(b)(4); 13 CFR 126.616(e); 13 CFR 127.506(e)

⁶⁶ 13 CFR 124.1002(f).

⁶⁷ 13 CFR 124.1002(f)(3).