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Important Changes for 8(a) Joint Ventures

By Jon Williams

Joint ventures are sometimes referred to in law as a "joint adventure." Often, the real adventure for small businesses is to make sense of how joint ventures are regulated. Effective March 14, the SBA has new rules for small business and 8(a) joint ventures. Whether you are currently in a joint venture or are considering one for future projects, you should be mindful of several important changes in the SBA's rules.

A joint venture may be awarded three contracts in a two-year period. The SBA changed its so-called "three in two" rule to permit joint ventures to receive up to three contracts in a two-year period. Previously, the rule limited joint ventures to the submission of three proposals in a two-year period, regardless of whether the proposals were successful. Because this often forced contractors to form additional joint ventures, each of which requires resources and administration, the SBA adopted the new rule to lessen the need for multiple joint ventures.

The SBA also added rules to help contractors better understand their window of opportunity under the "three in two" rule. The window opens on the date the joint venture is awarded its first contract and closes on the date the joint venture is awarded its third contract. Notably, the new rules allow joint ventures to continue submitting proposals until their window is closed, even though this may result in the award of more than three contracts to the joint venture.

However, you must keep in mind that the SBA may find affiliation between joint venture partners based on the number of contracts they perform together. There is no magic number of contracts for this analysis—it will depend on the "totality of the circumstances." If the parties have many other contracting partners, they should be able to perform a greater number of contracts together in joint ventures. However, for firms that put all of their contracting "apples" into one joint venture partner's "basket," be aware that this may more quickly create an affiliation that can adversely affect the joint venture's eligibility for set-aside contracts.

Joint ventures can be in any legal form. The SBA's new rules make clear that the form of the joint

venture (such as a limited liability company) is a business decision of the parties and is not the SBA's concern. In this regard, the SBA only requires that the joint venture be formed pursuant to a written agreement. These rules provide flexibility for business planning, which is good news for contractors.

All joint ventures under the SBA's 8(a) mentor-protégé program must follow the 8(a) joint venture regulations. One of the advantages of the SBA's 8(a) mentor-protégé program is the protégé's ability to form a joint venture with its mentor even if the mentor is a large business. Prior to the recent rule changes, mentor-protégé joint ventures were required to comply with the 8(a) joint venture regulations only if the joint venture pursued an 8(a) contract. Now, all mentor-protégé joint ventures must follow the 8(a) joint venture regulations, regardless of the type of contract the joint venture pursues. However, the SBA does not formally approve joint ventures for non-8(a) contracts.

Different rules apply to 8(a) joint ventures that have their own employees. When a joint venture has its own employees, the joint venture is said to be "populated." Conversely, an "unpopulated" joint venture has no employees and relies on the joint venture partners for the necessary personnel. Several of the new rules depend on whether an 8(a) joint venture is populated or unpopulated.

For example, in an unpopulated joint venture, the 8(a) joint venture partner must perform 40% of the work done by the joint venture. This includes all of the work done by the non-8(a) joint venture partner and any of its affiliates, including work done at the subcontract level. This rule limits (but does not eliminate) the non-8(a) partner's ability to perform work outside the joint venture as a subcontractor.

In a populated joint venture, the 8(a) firm is not required to perform a specific percentage of work. Instead, the 8(a) partner must demonstrate how it will benefit or otherwise develop its business from the joint venture relationship. It is unclear how this vague requirement will be evaluated. Furthermore, the non-8(a) partner in a populated joint venture cannot do any work as a subcontractor to the joint venture.

Under the new rules, parties in an unpopulated joint venture may share profits based on the percentages of work they perform. This is a favorable change because it relaxes the prior requirement to give at least 51% of the joint venture's profit to the 8(a) firm regardless of the work share.

However, for populated joint ventures, the new requirement is less clear. We believe the SBA intends for the 8(a) firm in a populated joint venture to receive profit commensurate with its ownership in the joint venture. This means that if the 8(a) firm owns 60% of the joint venture, it must receive 60% of the joint venture's profit.

On balance, the new rules will make unpopulated joint ventures more attractive for many small businesses.

In conclusion, the SBA's new rules solidified joint ventures as an important contracting tool for small businesses and have made joint ventures more accessible in several ways. But in some respects, there are still drawbacks and uncertainty. Understanding theses pros and cons is the key to maximizing the potential of joint ventures to grow your business.

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