CRITICAL THINKING, CLEAR DIRECTION, DECISIVE RESULTS

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Your Free Report About Joint Ventures and Federal Contracts

A joint venture of two or more business concerns may submit an offer as a small business for a Federal procurement, subcontract or sale so long as each concern is small under the size standard corresponding to the NAICS code assigned to the Contract. See 13 CFR **§ 125.8.**

Here are the 5 Most Costly Mistake that Government Contractors Make. These Mistakes Can Cost Them the Awarded Contract.

1. **Allowing non-managing venture partners to control aspects of the joint venture**. SBA Office of Hearings and Appeals (OHA) decision has previously stated that the managing venturer must control every aspect of the joint venture. The regulatory language is now somewhat vague because the Court of Federal Claims (COFC) held in 2022, "[a] minority owner's control over "extraordinary" actions, such as actions intended to protect the investment of minority shareholders, will not result in a finding of negative control" and applied this idea to a populated joint venture. Swift & Staley, Inc. v. United States, No. 21-1279, 2022 WL 1231428 (Fed. Cl. Mar. 31, 2022), aff'd, No. 2022-1601, 2022 WL 17576348 (Fed. Cir. Dec. 12, 2022).

   Tip: Guessing at what are "extraordinary actions" can be problematic. You should consider, as the managing venturer, having meetings and documented minutes to evidence discussions. However, the managing venture should the ultimate decision - is the key point. Having a say is not the same as making the final decision.

2. **Having Unlimited contracts beyond the two-year requirement.** SBA's regulations now provide that a specific joint venture may not be awarded contracts beyond a two-year period, starting from the date of the joint venture's first contract award, without the joint venture partners being

deemed affiliated. You should always look at the rules to see if there are any changes. See also 13 C.F.R. § 121.103(h).

Tip: Orders may be awarded under previously awarded contracts beyond the two-year period because "the restriction is on additional contracts, not continued performance on contracts already awarded[.]"

3. **Improper Populated Versus Unpopulated Joint Ventures.** SBA's regulations, as of today, provide that if a joint venture exists as a separate legal entity, it may not be populated with individuals intended to perform contracts awarded to the joint venture (It must have unpopulated members).

   Tip: This rule only applies to contracts set aside or reserved for small businesses. In other words, if a joint venture cannot be populated with individuals intended to perform for any contract or agreement set aside or reserved for small businesses, unless all parties to the joint venture are "similarly situated entities.

   Tip: Keep in mind that when determining the size of a populated joint venture, whether involving similarly situated entities or not, SBA will aggregate the revenues or employees of all partners to the joint venture. Said another way, a joint venture comprised of similarly situated entities may be populated with individuals intended to perform contracts set aside or reserved for small businesses, but the joint venture – when aggregating the revenues or employees for all partners to the joint venture – must still be "small" under the NAICS assigned to the set aside/reserved contract.

4. **Not Including All Contents of the Joint Venture:** 13 CFR § 125.8(b) discusses what must go into your joint venture agreement. Some companies make the mistake of either copying pasting old JV templates or (more dangerous) create another side deal with different terms.

   Tip: Creating side deals to offset the statutory terms of the joint venture will more than likely get you investigated or charged by the Department of Justice for procurement fraud. See this case. **(“**HX5 LLC and its owner and Chief Executive Officer, Margarita Howard, located in Fort Walton Beach, Florida, and an affiliated joint venture HX5 Sierra LLC, located in Cleveland, Ohio, have agreed to pay the **United States $7,759,693.92 to** resolve allegations that they violated the False Claims Act by knowingly providing false information to the Small Business Administration relating to HX5’s and HX5 Sierra’s eligibility for federal set-aside contracts intended for small businesses owned and controlled by socially and economically disadvantaged individuals.")

5. **Failing to update your joint venture agreement, and in putting ambiguous provisions in your joint venture agreement.** The regulations are clear as to what provisions must in included. The Department of Justice is actively pursuing companies for procurement fraud . Proving good faith mistakes are one thing but also keep in mind that in a bid protest, the joint venture may lose out on a contract and may not be subject to any other penalties.

   Tip: When the government believes that you *knowingly* violated the joint venture rules, the repercussions are more serious and costly. See this False Claims Act case.

   We hope that this information is helpful to your efforts of forming a joint venture relationship for federal government contracts. We also hope that you value any additional information we will be sending you in the next couple weeks.

   Bonus Tip: When forming teaming agreements and joint ventures, you should seriously consider forming a separate contract that spells out who will be doing what under the statement of work for the contract.

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