INTRODUCTION

The U.S. government has established a number of set-aside programs to encourage certain qualifying businesses to participate in cooperative arrangements, such as joint ventures with other contractors who do not otherwise qualify under the particular set-aside program. The 8(a) program under the Small Business Administration (SBA) is one such program. Forming these joint ventures must be done carefully because of the detailed rules established by SBA.

While joint ventures offer opportunities for otherwise unobtainable work, the relationship of the parties creates risks, as well. Most significantly, every contractor in a joint venture assumes “joint and several” liability for the acts or omissions of the joint venture. In other words, if there is damage to the project, each party is 100 percent responsible regardless of which venturer performed the work that caused the damage. As a result, these joint ventures are not to be entered lightly.

WHO CAN ENTER INTO JOINT VENTURES WITH 8(A) CONTRACTORS?

Any contractor who meets the definition of “small” under SBA rules can enter into a joint venture agreement with a qualifying 8(a) contractor. However, SBA’s general rule requires the participating parties’ combined revenues in the joint venture must meet SBA’s size standards. Consequently, the non-8(a) contractor’s business must be small enough so the combined numbers will not disqualify the joint venture from bidding or performing the work.

In certain cases, the joint venture rules are relaxed with regard to size standards. That is, the size standards are applicable only to each joint venture participant and not the joint venture as a whole. For example, certain federal procurements are consolidated into single contracts that are likely unsuitable for small-business concerns because of size, specialized nature of the project, total dollar value or geographical dispersion of performance sites. Such procurements are referred to as “bundled,” and the relaxed joint venture rules will apply in an effort to encourage more small-business participation.
The relaxed rules also will apply to a procurement that is not bundled but meets certain size restrictions. For example, the relaxed rules also will apply if the dollar value of the procurement exceeds half of the “small” size standard used by SBA. In certain opportunities, the relaxed rules may be enough to provide some contractors with additional joint venture opportunities.

**WHAT ARE SOME OF THE REQUIREMENTS FOR 8(A) JOINT VENTURES?**

Given the nature of the businesses that participate in the Section 8(a) program, SBA is mindful of the potential for abuse. The regulations provide joint ventures with 8(a) participants only are permissible where the 8(a) business lacks the capacity to perform the contract on its own and the joint venture agreement is fair and equitable and will provide a substantial benefit to the 8(a) participant. If SBA concludes the 8(a) contractor contributes little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, the joint venture will not be approved.

The 8(a) joint venture rules require a written joint venture agreement approved by SBA in advance of the project, and the agreement must contain certain provisions. Among the requirements, the 8(a) participant must be the managing venturer and must receive at least 51 percent of the joint venture net profits. Other requirements include specifying the parties’ responsibilities for work performance, labor and negotiations, as well as requiring certain bank accounts, record keeping and financial reports.

In addition, the regulations require the 8(a) participant to perform at least 40 percent of the work performed by the joint venture. How this 40 percent is measured varies somewhat depending on the structure of the joint venture, so having your joint venture agreement prepared by an attorney familiar with these rules is highly recommended. Any joint venture formed under these rules may only be awarded three contracts every two years, but the regulations specifically allow the same two entities to form additional joint ventures and accept additional jobs.

A mentor-protégé joint venture authorized under Section 8(a) rules has extra requirements. To be eligible, the parties must be in compliance with the mentor-protégé SBA rules. However, for contractors who have such an arrangement in place, the mentor-protégé joint venture rules are much more relaxed and require only that the protégé meets the SBA small-size standards and has not exceeded dollar limits available under the Section 8(a) program. The other standards applicable to a Section 8(a) joint venture apply (written joint venture agreement and the required provisions, work
performance and divisions of profits, etc.), but this arrangement allows a larger contractor to participate in projects containing set-asides for Section 8(a) participants.

WHAT ARE THE BONDING REQUIREMENTS OR CONCERNS?

Sureties are sometimes hesitant to issue bonds covering not only their client but also the other joint venture member with whom they are unfamiliar. Difficulties obtaining bonds are compounded by the fact that often the surety is not contacted until immediately before the bid is due, giving the surety little time to get comfortable with the risk. Every project, joint venture and surety is different, and there is no magic fix or standard form that will satisfy the surety in every circumstance. The keys to successfully obtaining a bond for such a relationship are communication and planning.

Provided the co-venturer is willing to execute a personal guaranty and the joint venture agreement contains cross-indemnity provisions between joint venturers, sureties typically will issue a bond to the joint venture with little hesitation. However, ample time should be allowed to get the documents in order and provide the surety a reasonable opportunity to perform a due diligence investigation of the proposed co-venturer.

Ultimately, above all else, sureties want to feel comfortable with the arrangement. Last-second emergency requests to produce a bond for an unfamiliar arrangement do not instill comfort or confidence. By planning with the surety ahead of time, communicating to assure the surety’s concerns are addressed in the joint venture agreement, educating the surety regarding the underlying need for the arrangement and holding the surety’s hand throughout the process, an established contractor in a joint venture should be able to persuade its surety to bond the project.

WHAT IS THE BEST WAY TO FIND AN 8(A) BUSINESS TO FORM A JOINT VENTURE?

Selecting a contractor for a joint venture is as important as selecting subcontractors for private jobs. As noted above, joint venturers each assume “joint and several” liability for the joint venture, risking 100 percent responsibility for damages or losses caused by the other venturer. A set-aside contractor in a joint venture not only will perform a portion of the work, but also will generally be responsible for complying with paperwork requirements and receiving and distributing
funds from the government. The best way to reduce the likelihood of additional expenses and exposures from a joint venture partner is to do your homework, spend the time necessary to learn about the other contractor and, if possible, develop a relationship with a well-qualified minority contractor during a series of projects.

On many set-asides, the government will provide a list of interested qualifying contractors. Some of these may be genuine construction companies that do not have the bonding capacity or experience necessary to perform a complex, large government project. Others may be “fly-by-night” companies with little more than an office and a telephone, who plan to contribute little or nothing to the job other than adding their names in exchange for a fee. Although identifying and selecting a quality venturer can be a painstaking process, associating with a “fly-by-night” type of company can result in a number of problems down the road, from failure to receive timely payments to criminal investigations if the government is affirmatively misled as to whether the contractor actually will contribute anything of value to the project.

In addition, a good selection can simplify the bonding process. By thoroughly investigating your proposed partner, picking a steady contractor who does real work and building a strong relationship, you create a situation that allows your surety to be more comfortable than if you pick a name off a list.

CONCLUSION

Setting up a joint venture with an 8(a) qualified business can be a productive way to locate and acquire new business. This process is filled with mines and traps, however, and care should be exercised to be sure the joint venture will comply with necessary rules. In addition, the model forms produced by SBA do not address many liability concerns, so they cannot be relied on to be effective joint venture agreements. Any contractor contemplating such an arrangement should be sure to coordinate with its surety and bring in an attorney who is familiar with these requirements. By making sure the arrangement is properly established and documented ahead of time, productive ventures are established and a great deal of expense and aggravation is avoided down the road.

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