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## Joint Venture Agreements: Make a List and Check it Twice

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When the Government issues a procurement as a set aside for entities within a specified small business status program (e.g. SDVOSB, VOSB, EDWOSB, WOSB, 8(a), HUBZone, and small business), eligible companies may not have the capacity or experience to successfully compete for the work on their own. Recognizing this difficulty, the Small Business Administration (SBA) promulgated regulations that permit small businesses to joint venture with other companies, including large businesses, to compete for set-aside procurements, without being deemed affiliated with each other. SBA's regulations require that a joint venture be established for a particular purpose and include a list of requirements to ensure that the joint venture is controlled by the partner with the requisite status. Two recent decisions demonstrate the impact of failing to meet the listed requirements in order to comply with these regulations.

For example, in *ASIRTek Federal Services, LLC*, SBA No. VET-269, the United States Air Force issued an RFP for an IDIQ Contract seeking technology support, and set aside the procurement entirely for service disabled veteran owned small businesses. The Air Force awarded a contract to ASIRTek Federal Services, LLC, a joint venture between ITI Solutions (a SDVOSB) and FEDITC, an a non-SDVOSB. CyProTech challenged both the size and SDVOSB status of ASIRTek. SBA scrutinized the joint venture agreement between FEDITC and ITI. SBA found numerous instances in which the joint venture agreement did not comply with the list—that is, it deviated from SBA's SDVOSB regulations.

- The joint venture agreement was set up to perform 8(a) set-aside contracts, not to compete for SDVOSB set-aside contracts;
- The joint venture agreement failed to allocate profits and losses in accordance with the SDVOSB regulations;
- The joint venture agreement did not specify the responsibilities of the parties to perform under the contract, as required by the SDVOSB regulations; and
- The joint venture agreement provided FEDITC, a non-SDVOSB company, with the ability to control the Joint Venture, in violation of SBA's SDVOSB regulations.

SBA explained that in addition to self-certifying as an SDVOSB, "joint venturers must also prepare a [joint venture agreement] that meets certain requirements." Because ASIRTek

failed to comply with the specific regulatory requirements identified above, SBA concluded that the joint venture did not qualify as an SDVOSB, and was therefore ineligible to receive the award. By failing to draft a joint venture agreement that complied with SBA's SDVOSB regulations, ASIRTek cost itself an IDIQ Contract award with a maximum value of \$99.9 million.

A recent bid protest decision at The Court of Federal Claims, *Senter, LLC v. United States*, \_\_\_ Fed Cl. \_\_\_ tells a similar cautionary tale. There, the United States Coast Guard set aside a procurement for 8(a) entities to provide support services to Coast Guard headquarters. Sylvain Analytics, Inc., an approved 8(a) company, sought to enter into a joint venture agreement with non-8(a) members to compete for this work. The joint venture agreement, however, failed to comply with the applicable regulations. In this case, the joint venture agreement was unclear as to whether the joint venture would be "populated," meaning the joint venture would employ individuals to perform the work, or "unpopulated," meaning the joint venture would not employ personnel, but would "subcontract" with the joint venture members. The regulations now explicitly prohibit the use of a "populated" joint venture. Therefore, the Court of Federal Claims found that Senter was not eligible as an 8(a) joint venture because it failed to comply with the explicit requirements in the joint venture regulations.

Joint ventures can help companies compete for opportunities that would not be available to them without the help of a joint venture partner. However, the cases described above make clear that finding a joint venture partner is only the start—the joint venture agreement also must be drafted carefully to comply with the regulations, which are often difficult and complex to navigate. Therefore, when choosing to utilize a joint venture to compete for a procurement, contractors must make a list—and check it twice—to ensure that your agreement complies with applicable laws and regulations.

Cordatis has years of experience drafting joint venture agreements and is knowledgeable about SBA's regulations. If you need assistance in drafting your joint venture agreement, you may call me at 202-342-2550 or contact me via email at [dstrouse@cordatislaw.com](mailto:dstrouse@cordatislaw.com).