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Column: Now is the Time for a Joint Venture Checkup

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On August 24, 2016, the Small Business Administration's long-awaited rules creating the new small business mentor-protégé program took effect. What you may not realize is that SBA's new rules dealt with many issues beyond the mentor-protégé program. Among the many rule changes were significant new rules and revisions to the existing rules for joint ventures.

While SBA's new joint venture rules should not impact joint ventures performing contracts obtained prior to August 24, the new rules will impact existing joint ventures that bid on new contracts after August 24. Additionally, the new rules impact joint ventures formed for the first time after August 24.

Therefore, whether you are already operating in a joint venture, or if you are thinking of forming a new joint venture, you need to be mindful of the changed requirements. With bidding season upon us, now is the time to make sure your existing joint venture or internal template is compliant with the new rules. It is critical to perform a checkup for your joint venture before bidding on new work through it because failure to comply with SBA's rules could cause your joint venture to be ineligible for contract award or make the joint venture vulnerable to protest.

Many of the changes modify pre-existing joint venture rules and result in a significant change from how joint ventures previously operated. For example, under the

prior rules, a joint venture could be populated (i.e., have its own employees) or unpopulated. However, as of August 24, SBA's rules only permit unpopulated joint ventures. This means that if you are currently operating in a populated joint venture, you cannot bid on new contracts through the populated joint venture after August 24.

Another significant change is in the requirements for joint ventures that pursue HUBZone, Service-Disabled Veteran-Owned, and Woman-Owned small business set-aside contracts. Previously, the joint venture requirements for these programs were somewhat sparse, with less stringent requirements than for 8(a) joint ventures.

Now, the joint venture requirements are comparable for all of the set-aside programs. That means there are more specific requirements with which you must comply when using a joint venture to pursue HUBZone, SDVOSB, or WOSB contracts. If you have an existing joint venture for one of these programs, you will likely need to add or change provisions in your joint venture agreement before pursuing additional HUBZone, SDVOSB, or WOSB contracts.

There are many other changes to the joint venture rules that are a departure from the rules with which you may be familiar. For example, SBA changed the rule on profit sharing between joint venture partners and it instituted a

new rule prohibiting a protégé from hiring the joint venture project manager from its mentor. SBA also expanded its authority to inspect the joint venture's records.

In addition to changing the existing rules, SBA added a few brand new requirements for joint ventures. Joint ventures must now be listed and described in www.SAM.gov following specific parameters to make clear the entity is a joint venture. Furthermore, the joint venture partners are required to submit annual and project-end certifications of compliance with the applicable joint venture and performance of work rules.

The bottom line is that if you have an existing joint venture, you likely will need to modify or add language to make sure your agreement is consistent with the changed rules. So you should be wary of continuing with an existing joint venture agreement, or dusting off an old joint venture template agreement, before giving it a thorough checkup under the new rules. In most cases, the new rules should not require an extensive re-working of your joint venture documents. And the ounce of prevention will go a long way toward ensuring your joint venture is best-equipped to weather a post-award challenge.

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