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Column: The Land Mines of Unpopulated Joint Ventures

By Megan C. Connor, partner, PilieroMazza PLLC

The Small Business Administration has all but eliminated the populated joint venture (i.e., a joint venture with employees of its own performing direct labor).

As a result, companies that want to form a joint venture for set-aside opportunities and to not be affiliated with each other need to form an unpopulated joint venture.

While SBA's preference for unpopulated joint ventures is meant to benefit small business venturers and provide them with more hands-on experience, it creates wrinkles for the venturers.

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Scope of Work

When an unpopulated joint venture is awarded a contract, employees of the venturers perform the work on behalf of the joint venture. Because the contract is held in the name of the joint venture, the venturers act like subcontractors in contract performance.

Often, venturers do not enter a separate contract with the joint venture specifying the venturers' work on behalf of the joint venture. There is no SBA requirement for the venturers to do so and, indeed, the joint venture agreement itself must specify the venturers' responsibilities with regards to contract performance.

However, it may be prudent for the venturers to contract with the joint venture. For example, if the joint venture is awarded an ID/IQ contract, the venturers may want to consider implementing an ordering procedure whereby, upon award of an order to the joint venture, the joint venture will likewise issue an order to each venturer specifying their respective scopes of work.

Profits

Another complexity of unpopulated joint ventures is the handling of profits. SBA's regulations make clear that each participant in the joint venture must receive profits from the joint venture commensurate with the work performed by the concern.

But, more often than not, unpopulated joint ventures are pass-through entities in which revenues of the joint venture go directly to the venturers as compensation for their work on behalf of the joint venture.

For instance, if the joint venture bills its customer $1,000, of which one venturer did 40% of the work and the other venturer did 60% of the work, then one venturer is going to be paid $400 and the other is going to be paid $600, respectively. Such a scenario leaves no income at the joint venture level and, therefore, no profits to distribute. (Of course, if the venturers are paid in accordance with their workshare, presumably such payment includes profit.)

Sometimes venturers decide to have the joint venture apply a markup to their separate costs, similar to a prime contractor's markup on a subcontractor's invoice. In these cases, the joint venture would retain income, and any profit would be required to be distributed to the venturers commensurate with the work performed. If venturers decide to proceed this way, the markup should be addressed in the joint venture agreement.

GSA Schedule Contracts

One of the biggest hiccups for venturers (and potential venturers) is that the unpopulated joint venture they form cannot use the GSA Schedule contract of either or both of the venturers.

Rather, because the joint venture is an entity separate from its members, the joint venture itself must hold a GSA Schedule in order to pursue orders thereunder.

But it does not often make sense for a joint venture to go through the process of obtaining a GSA Schedule because joint ventures, by definition, are limited purpose entities.

Instead, GSA's contractor team arrangements, in which members of the team may utilize one another's GSA Schedules, are meant to be an option in lieu of joint venturing for GSA Schedule opportunities.

Facility Clearances

Sometimes solicitations will allow an unpopulated joint venture to rely on the facility clearance of one or both of the venturers for purposes of submitting a proposal. However, more often than not, the joint venture itself will need a facility clearance of its own in order to perform a cleared contract.

Importantly, an entity without personnel is ineligible for a facility clearance. Therefore, the venturers will need to "populate" the joint venture with administrative personnel who hold the necessary level of clearance—which SBA allows without rendering the joint venture populated. The joint venture's facility clearance will then be based on the clearances of these administrative personnel.

Conclusion

An unpopulated joint venture allows all parties to the joint venture to obtain hands-on experience on the joint venture's contracts. But the venturers must keep in mind that these entities create unique challenges that they should step through as they form the joint venture.

Megan C. Connor is a partner at PilieroMazza PLLC.