

Small Business Administration

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protest the procuring activity's estimate of current fair market price to the Secretary of the Department or head of the agency in accordance with § 124.505.

§ 124.512 Delegation of contract administration to procuring agencies.

(a) SBA may delegate, by the use of special clauses in the 8(a) contract documents or by a separate agreement with the procuring activity, all responsibilities for administering an 8(a) contract to the procuring activity except the approval of novation agreements under 48 CFR 42.302(a)(25). Tracking compliance with the performance of work requirements set forth in § 124.510 is included within the functions performed by the procuring activity as part of contract administration.

(b) This delegation of contract administration authorizes a contracting officer to execute any priced option or in scope modification without SBA's concurrence. The contracting officer must, however, submit copies to the SBA servicing district office of all modifications and options exercised within 15 business days of their occurrence, or by another date agreed upon by SBA.

(c) SBA may conduct periodic compliance on-site agency reviews of the files of all contracts awarded pursuant to Section 8(a) authority.

[63 FR 35739, June 30, 1998, as amended at 76 FR 8261, Feb. 11, 2011]

§ 124.513 Under what circumstances can a joint venture be awarded an 8(a) contract?

(a) *General.* (1) A Participant may enter into a joint venture agreement with one or more other small business concerns, whether or not 8(a) Participants, for the purpose of performing one or more specific 8(a) contracts.

(2) A joint venture agreement is permissible only where an 8(a) concern lacks the necessary capacity to perform the contract on its own, and the agreement is fair and equitable and will be of substantial benefit to the 8(a) concern. However, where SBA concludes that an 8(a) Participant brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status, SBA

will not approve the joint venture to receive an 8(a) sole source contract award and will find the joint venture to be ineligible for a competitive 8(a) award if it is determined to be the apparent successful offeror.

(b) *Size of concerns to an 8(a) joint venture.* (1) A joint venture of at least one 8(a) Participant and one or more other business concerns may submit an offer as a small business for a competitive 8(a) procurement, or be awarded a sole source 8(a) procurement, so long as each concern is small under the size standard corresponding to the NAICS code assigned to the procurement.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, a joint venture between a protégé firm and its approved mentor (*see* § 124.520) will be deemed small provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the contract and has not reached the dollar limits set forth in § 124.519.

(3) SBA approval of a joint venture agreement pursuant to paragraph (e) of this section does not equate to a formal size determination. As such, despite SBA's approval of a joint venture, the size status of a joint venture that is the apparent successful offeror for a competitive 8(a) contract may be protested pursuant to § 121.1001(a)(2) of this chapter. *See* § 124.517(b).

(c) *Contents of joint venture agreement.* Every joint venture agreement to perform an 8(a) contract, including those between mentors and protégés authorized by § 124.520, must contain a provision:

(1) Setting forth the purpose of the joint venture;

(2) Designating an 8(a) Participant as the managing venturer of the joint venture, and designating a named employee of the 8(a) managing venturer as the manager with ultimate responsibility for performance of the contract (the "Responsible Manager").

(i) The managing venturer is responsible for controlling the day-to-day management and administration of the contractual performance of the joint venture, but other partners to the joint

venture may participate in all corporate governance activities and decisions of the joint venture as is commercially customary.

(ii) The individual identified as the Responsible Manager of the joint venture need not be an employee of the 8(a) Participant at the time the joint venture submits an offer, but, if he or she is not, there must be a signed letter of intent that the individual commits to be employed by the 8(a) Participant if the joint venture is the successful offeror. The individual identified as the Responsible Manager cannot be employed by the mentor and become an employee of the 8(a) Participant for purposes of performance under the joint venture.

(iii) Although the joint venture managers responsible for orders issued under an IDIQ contract need not be employees of the protégé, those managers must report to and be supervised by the joint venture's Responsible Manager;

(3) Stating that with respect to a separate legal entity joint venture the 8(a) Participant(s) must own at least 51% of the joint venture entity;

(4) Stating that the 8(a) Participant(s) must receive profits from the joint venture commensurate with the work performed by the 8(a) Participant(s), or a percentage agreed to by the parties to the joint venture whereby the 8(a) Participant(s) receive profits from the joint venture that exceed the percentage commensurate with the work performed by the 8(a) Participant(s);

(5) Providing for the establishment and administration of a special bank account in the name of the joint venture. This account must require the signature or consent of all parties to the joint venture for any payments made by the joint venture to its members for services performed. All payments due the joint venture for performance on an 8(a) contract will be deposited in the special account; all expenses incurred under the contract will be paid from the account as well;

(6) Itemizing all major equipment, facilities, and other resources to be furnished by each party to the joint venture, with a detailed schedule of cost or value of each, where practical. If a con-

tract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated major equipment, facilities, and other resources to be furnished by each party to the joint venture, without a detailed schedule of cost or value of each, or in the alternative, specify how the parties to the joint venture will furnish such resources to the joint venture once a definite scope of work is made publicly available;

(7) Specifying the responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, including ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, where practical. If a contract is indefinite in nature, such as an indefinite quantity contract or a multiple award contract where the level of effort or scope of work is not known, the joint venture must provide a general description of the anticipated responsibilities of the parties with regard to negotiation of the contract, source of labor, and contract performance, not including the ways that the parties to the joint venture will ensure that the joint venture and the 8(a) partner(s) to the joint venture will meet the performance of work requirements set forth in paragraph (d) of this section, or in the alternative, specify how the parties to the joint venture will define such responsibilities once a definite scope of work is made publicly available;

(8) Obligating all parties to the joint venture to ensure performance of the 8(a) contract and to complete performance despite the withdrawal of any member;

(9) Designating that accounting and other administrative records relating to the joint venture be kept in the office of the 8(a) Participant managing venturer, unless approval to keep them elsewhere is granted by the District Director or his/her designee upon written request;

(10) Requiring the final original records be retained by the 8(a) Participant managing venturer upon completion of the 8(a) contract performed by the joint venture;

(11) Stating that quarterly financial statements showing cumulative contract receipts and expenditures (including salaries of the joint venture's principals) must be submitted to SBA not later than 45 days after each operating quarter of the joint venture; and

(12) Stating that a project-end profit and loss statement, including a statement of final profit distribution, must be submitted to SBA no later than 90 days after completion of the contract.

(d) *Performance of work.* (1) For any 8(a) contract, including those between a protégé and a mentor authorized by § 124.520, the joint venture must perform the applicable percentage of work required by § 124.510 of this chapter.

(2) The 8(a) partner(s) to the joint venture must perform at least 40% of the work performed by the joint venture.

(i) The work performed by the 8(a) partner(s) to a joint venture must be more than administrative or ministerial functions so that the 8(a) partners gain substantive experience.

(ii) The amount of work done by the partners will be aggregated and the work done by the 8(a) partner(s) must be at least 40% of the total done by all partners. In determining the amount of work done by a non-8(a) partner, all work done by the non-8(a) partner and any of its affiliates at any subcontracting tier will be counted.

(e) *Prior approval by SBA.* (1) When a joint venture between one or more 8(a) Participants seeks a sole source 8(a) award, SBA must approve the joint venture prior to the award of the sole source 8(a) contract. SBA will not approve joint ventures in connection with competitive 8(a) awards (*but see* § 124.501(g) for SBA's determination of Participant eligibility).

(2) Where a joint venture has been established for one 8(a) contract, the joint venture may receive additional 8(a) contracts provided the parties create an addendum to the joint venture agreement setting forth the performance requirements for each additional award (and provided any contract is

awarded within two years of the first award as set forth in § 121.103(h)). If an additional 8(a) contract is a sole source award, SBA must also approve the addendum prior to contract award.

(f) *Capabilities, past performance, and experience.* When evaluating the capabilities, past performance, experience, business systems, and certifications of an entity submitting an offer for an 8(a) contract as a joint venture established pursuant to this section, a procuring activity must consider work done and qualifications held individually by each partner to the joint venture as well as any work done by the joint venture itself previously. A procuring activity may not require the 8(a) Participant to individually meet the same evaluation or responsibility criteria as that required of other offerors generally. The partners to the joint venture in the aggregate must demonstrate the past performance, experience, business systems, and certifications necessary to perform the contract.

(g) *Contract execution.* Where an 8(a) award will be made to a joint venture, the procuring activity will execute an 8(a) contract in the name of the joint venture entity or the 8(a) Participant, but in either case will identify the award as one to an 8(a) joint venture or an 8(a) mentor-protégé joint venture, as appropriate.

(h) *Amendments to joint venture agreement.* Where SBA has approved a joint venture for a sole source 8(a) contract, all amendments to the joint venture agreement must be approved by SBA.

(i) *Inspection of records.* The joint venture partners must allow SBA's authorized representatives, including representatives authorized by the SBA Inspector General, during normal business hours, access to its files to inspect and copy all records and documents relating to the joint venture.

(j) *Certification of compliance.* Prior to the performance of any 8(a) contract by a joint venture, the 8(a) BD Participant to the joint venture must submit a written certification to the contracting officer and SBA, signed by an authorized official of each partner to the joint venture, stating as follows:

(1) The parties have entered into a joint venture agreement that fully

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complies with paragraph (c) of this section; and

(2) The parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements set forth in paragraph (d) of this section.

(3) For a sole source 8(a) contract, the parties have obtained SBA's approval of the joint venture agreement and any addendum to that agreement and that there have been no modifications to the agreement that SBA has not approved.

(k) *Performance of work reports.* An 8(a) Participant to a joint venture must describe how it is meeting or has met the applicable performance of work requirements for each 8(a) contract it performs as a joint venture.

(1) As part of its annual review, the 8(a) Participant(s) to the joint venture must explain for each 8(a) contract performed during the year how the performance of work requirements are being met for the contract.

(2) At the completion of every 8(a) contract awarded to a joint venture, the 8(a) Participant(s) to the joint venture must submit a report to the local SBA district office explaining how the performance of work requirements were met for the contract.

(1) *Basis for suspension or debarment.* The Government may consider the following as a ground for suspension or debarment as a willful violation of a regulatory provision or requirement applicable to a public agreement or transaction:

(1) Failure to enter a joint venture agreement that complies with paragraph (c) of this section;

(2) Failure to perform a contract in accordance with the joint venture agreement or performance of work requirements in paragraph (d) of this section; or

(3) Failure to submit the certification required by paragraph (e) of this section or comply with paragraph (i) of this section.

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§ 124.514 Exercise of 8(a) options and modifications.

(a) *Unpriced options.* The exercise of an unpriced option is considered to be a new contracting action.

(1) If a concern has graduated or been terminated from the 8(a) BD program or is no longer small under the size standard corresponding to the NAICS code for the requirement, negotiations to price the option cannot be entered into and the option cannot be exercised.

(2) If the concern is still a Participant and otherwise eligible for the requirement on a sole source basis, the procuring activity contracting officer may negotiate price and exercise the option provided the option, considered a new contracting action, meets all regulatory requirements, including the procuring activity's offering and SBA's acceptance of the requirement for the 8(a) BD program.

(3) If the estimated fair market price of the option exceeds the applicable threshold amount set forth in § 124.506, the requirement must be competed as a new contract among eligible Participants.

(b) *Priced options.* Except as set forth in § 124.521(e)(2), the procuring activity contracting officer may exercise a priced option to an 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

(c) *Modifications beyond the scope.* A modification beyond the scope of the initial 8(a) contract award is considered to be a new contracting action. It will be treated the same as an unpriced option as described in paragraph (a) of this section.

(d) *Modifications within the scope.* The procuring activity contracting officer may exercise a modification within the scope of the initial 8(a) contract whether the concern that received the award has graduated or been terminated from the 8(a) BD program or is no longer eligible if to do so is in the best interests of the Government.

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