DEPARTMENT OF VETERANS AFFAIRS
Deputy Assistant Secretary for Acquisition and Materiel Management
Washington DC 20420

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OFFICE OF ACQUISITION AND MATERIEL MANAGEMENT INFORMATION LETTER

TO: Under Secretaries for Health, Benefits, and Memorial Affairs; Assistant Secretary for Management; Chief Facilities Management Officer, Office of Facilities Management; Veterans Integrated Service Network Directors; Directors, VA Medical Center Activities, Domiciliaries, Outpatient Clinics, Medical and Regional Office Centers, and Regional Offices; Directors, Denver Distribution Center, Austin Automation Center, Records Management Center, VBA Benefits Delivery Centers, and VA Health Administration Center; and the Executive Director and Chief Operating Officer, VA National Acquisition Center

ATTN: Heads of the Contracting Activity and VA Contracting Officers

SUBJ: Joint Venture and Teaming Arrangements for Service-Disabled Veteran-Owned Small Businesses

1. This Information Letter (IL) provides guidance on the review and acceptance of joint ventures and teaming arrangements proposed by service-disabled veteran-owned small businesses (SDVOSBs), as outlined in Federal Acquisition Regulation (FAR) Subpart 9.6 and 13 Code of Federal Regulations (CFR) section 125.15 (see http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/index.tpl and browse Title 13). The information on joint ventures in 13 CFR 125.15 is not in the FAR, but it does apply to VA acquisitions.

2. This IL does not apply to joint ventures under the 8(a) or HUBZone programs. The Small Business Administration (SBA) reviews and approves joint venture agreements under the 8(a) and HUBZone programs. However, VA contracting officers must review and approve such agreements under the SDVOSB procurement program. A joint venture agreement under the SDVOSB procurement program does not have to meet all of the requirements of a joint venture agreement under the 8(a) or HUBZone programs, but a joint venture agreement under the 8(a) or HUBZone programs may meet the requirements of an SDVOSB joint venture agreement, provided the 8(a) or HUBZone participant is also an SDVOSB.

3. A joint venture is defined as two or more businesses joining together under a contractual agreement to conduct a specific business enterprise with both parties sharing profits and losses. The joint venture is generally for one specific contract only, rather than for a continuing business relationship, such as a strategic alliance or partnership. A joint venture is a separate legal entity, must have a separate

DUNS number, and must be separately registered in the Central Contract Registration (CCR). A teaming arrangement that does not constitute a partnership or a joint venture does not create a separate legal entity. A contractor team that consists of a prime contractor and subcontractors must submit a bid or offer in the name of the SDVOSB as the prime contractor to qualify for award under an SDVOSB set-aside, and the SDVOSB prime contractor must perform at least the minimum amount of work required by the FAR clause at 52.219-27.

4. To qualify as a joint venture under the SDVOSB program, each party to the joint venture must be a small business and one of the parties, the managing participant, must be an SDVOSB. Further determination of whether or not the joint venture, as an entity, qualifies as a small business depends on the dollar value of the proposed contract.

a. For a procurement with an assigned North American Industrial Classification System (NAICS) code that has a revenue-based size standard, if the procurement exceeds half the value of that size standard, e.g., if the size standard is $13 million and the solicitation is estimated at $8 million (more than half the size of the standard), no further size evaluation of the joint venture is required as long as each member of the joint venture is a small business. The combined size of the two companies is immaterial in that case.

b. For a procurement with an assigned NAICS code having an employee-based size standard, if the procurement exceeds $10 million, no further size evaluation of the joint venture is required as long as each member of the joint venture is a small business.

c. For a procurement that does not exceed the thresholds noted in paragraphs a. or b. above, not only must each member of the joint venture qualify as a small business, but the proposed joint venture, as a combined entity, must also qualify as a small business under the size standards for the NAICS code assigned.

d. For example, paragraph a. above would apply to a joint venture consisting of two small businesses, one an SDVOSB with an average annual income of $4 million and the other a small business with an average annual income of $10 million, if the NAICS size standard was $13 million, e.g., an electrical construction project, and the solicitation was valued at over $6.5 million (more than half the value of the NAICS code). That same joint venture entity would not qualify as a small joint venture, and would not be eligible for award under an SDVOSB set-aside, if the dollar value of that electrical construction procurement

was less than $6.5 million, since the combined total average annual income of the members of the joint venture would be more than the $13 million size standard for that NAICS code. In that case, paragraph c. above would apply.

e. An example involving the number of employees would be where a joint venture consisting of two small businesses, one an SDVOSB with 280 employees and the other a small business with 400 employees, would qualify as a small joint venture on a solicitation with a NAICS size standard of 500 employees if the solicitation was valued at over $10 million (paragraph b. above would apply). However, that same joint venture entity would not qualify as a small joint venture and would not be eligible for award under an SDVOSB set-aside if the dollar value of the procurement was less than $10 million, since the combined total number of employees of the members of the joint venture would be more than 500 employees (paragraph c. above would apply).

f. A final determination on whether or not a specific joint venture qualifies as a small business can only be made by SBA in accordance with FAR 19.3.

5. In addition to the requirement that at least one of the members of the joint venture be an SDVOSB, a joint venture may qualify as an SDVOSB joint venture for a set-aside or sole source award under Public Law 108-183, the Veterans Benefits Act of 2003, only so long as the joint venture agreement entered into by the participating small businesses meets certain other conditions specified in 13 CFR 125.15. The joint venture agreement between the parties must contain the following provisions:

a. A statement of the purpose of the joint venture, including a reference to the solicitation number of the acquisition under which the joint venture intends to submit an offer;

b. A statement designating the SDVOSB member as the managing venturer of the contract and designating an employee of the SDVOSB managing venturer as the project manager responsible for performance of the contract. (Note: The contracting officer should take into consideration the qualifications of the SDVOSB to perform and manage the contract, as well as the qualifications of the other members of the joint venture, when determining the overall responsibility of the joint venture.);

c. A statement that not less than 51 percent of the net profits earned by the joint venture will be distributed to the SDVOSB;

d. Statements specifying the responsibilities of the parties with regard to contract performance, source of labor, and negotiation of the contract (the SDVOSB member should be the party responsible for negotiating the contract and any subsequent contract modifications);

e. A statement that each party to the joint venture is obligated to ensure performance of the contract and to complete performance despite the withdrawal of any member; and

f. A statement requiring that the final original contractor records under the contract shall be retained by the SDVOSB managing venturer upon completion of the contract performed by the joint venture.

6. The joint venture agreement need not accompany the joint venture's bid, but the agreement must be submitted to the contracting officer for review and approval prior to award. The contracting officer is responsible for making the determination whether or not the agreement meets the requirements of 13 CFR 125.15. If the contracting officer determines that the agreement, as submitted, fails to meet any of the requirements of 13 CFR 125.15, award may not be made to the joint venture. The joint venture may not be allowed to modify the agreement to comply with these requirements after bid opening, as the joint venture agreement must meet these requirements and the joint venture must qualify as an SDVOSB joint venture at the time the bid is submitted, not after bid opening (reference Comp. Gen. Decision C&S Carpentry Services, Inc., B-253615, October 6, 1993, see Attachment 1). Under a sole source solicitation, where only one bid/offer is received, the prohibition against modification might not apply since the offeror may be allowed to submit a new offer as the revised entity. The contracting officer must seek legal counsel in that case. Determinations of whether or not joint venture agreements meet the minimum requirements of 13 CFR 125.15 are not subject to the Certificate of Competency provisions of FAR 19.6. Contracting officers may seek the advice of the Office of the General Counsel and the Acquisition Assistance Division when making such reviews and determinations.

7. If required by FAR 19.508(e), the solicitation shall include the clause at 52.219-14, Limitations on Subcontracting, and shall require the contractor (the joint venture) to perform a specified minimum percentage of the work. The performance of work

requirements apply to the cooperative effort of the joint venture, not its individual members. Thus, the joint venture must perform the minimum percentage of work, not the SDVOSB individual member of the joint venture.

8. 13 CFR 125.15(b)(4) states that the procuring activity will execute an SDVOSB contract in the name of the joint venture entity or the SDVOSB. However, the practical aspects of this provision are addressed below.

a. The award must be made to the legal entity that submitted the bid and, for an SDVOSB set-aside, that legal entity must qualify as an SDVOSB or an SDVOSB joint venture. Thus, if the joint venture submitted the bid, the award must be made to the joint venture, not to the SDVOSB member of the joint venture. In certain circumstances, it may be possible for only one company name to appear on the bid, but, in that case for an SDVOSB set-aside, the named entity on the bid must either be the SDVOSB or the qualifying SDVOSB joint venture. Bonds, if required, must also be issued in the name of the legal entity that submitted the bid. It may be possible for the name on the bid and on the bonds to be that of the non-SDVOSB member of the joint venture provided the joint venture agreement grants that company and the individual who signed the bid authority to sign the bid and related documents and provided the bidder is identified as a joint venture in clause 52.204-3 or 52.212-3 and/or is registered in the Central Contractor Registration (CCR) or in the Online Representations and Certification Application (ORCA) Web site (http://orca.bpn.gov (copy this address and past into your browser)) as a joint venture and is identified as a joint venture on the bonds. The legal entity submitting the bid, if it is the joint venture, must be registered in CCR as a joint venture. If the solicitation does not include clauses 52.204-3 or 52.212-3, then the bidder's registration in CCR or in ORCA as a joint venture can be used as the basis for determining that the bidding entity is a joint venture. However, in cases where the non-SDVOSB member of the joint venture signs the bid and contract documents, contracting officers must evaluate whether or not the SDVOSB is actually the managing venturer (see paragraph 4.b. above). If the contracting officer determines that the SDVOSB is not the managing venturer, the bid must be rejected.

b. If a bid is submitted under an SDVOSB set-aside in the name of the SDVOSB with no indication anywhere, including in clauses 52.204-3 or 52.212-3 or in CCR or ORCA, that the SDVOSB bidder is a joint venture, then the award must be made to and in the name of the SDVOSB bidder whether or not a joint venture agreement exists. In that case, the joint venture agreement would not have to meet the requirements in paragraph 4. since the actual awardee is not the joint venture but

rather the SDVOSB. However, the joint venture agreement may be taken into consideration by the contracting officer in determining the responsibility of the SDVOSB bidder.

c. For a bid submitted under an SDVOSB set-aside that is in the name of the non-SDVOSB only with no other indication in the bid or in CCR or ORCA that the bidding entity is a joint venture, then award under an SDVOSB set-aside may not be made to that bidder or to the SDVOSB, whether or not a joint venture agreement exists, since the actual bidding entity is not an SDVOSB or an SDVOSB joint venture. Such a bid must be rejected.

9. Bonds, if required (i.e., bid, payment, performance), must have been issued by the surety in the name of the legal entity submitting the bid. If that legal entity is a joint venture (the bid was submitted in the name of a joint venture), then the named "PRINCIPAL" on the bonds must be the joint venture that submitted the bid and the "Type of Organization" shown on the bonds must be checked as "Joint Venture." As indicated in paragraph 7. above, it may be possible to accept a bid with only one named entity provided the bid or the named entity's CCR registration identifies that entity as a joint venture, the bonds identify that entity as a joint venture, and the joint venture agreement meets the requirements for an SDVOSB joint venture and grants the bidding entity authority to sign the bid and related documents on behalf of the SDVOSB joint venture. If the bid is submitted in the name of the SDVOSB with no indication, including in clauses 52.204-3 or 52.212-3 or in CCR or ORCA or on the bonds, that the bidder is a joint venture, then the bonds must be in the name of the SDVOSB and the "Type of Organization" shown on the bonds must correspond with the type of organization shown in the bid or in CCR for the SDVOSB bidder. The bonds must be for the actual bidder or contractor, not some other legal entity. Bonding issues can be complicated and acceptance of the bonds may depend on varying circumstances. Please see paragraph 12. below if you have any questions relating to acceptance of bonds.

10. Protests regarding offerors' service-disabled veteran-owed (SDVO) status or small business size status will be handled as follows:

a. For a sole source procurement, only SBA or the contracting officer may protest an offeror's status as an SDVO business. For a competitive set-aside (note that every SDVOSB set-aside must be competed, whether or not sole source award is being considered), any interested party (any offeror, SBA, or the contracting officer) may protest an offeror's status as an SDVO business.

A protest relating only to the SDVO status of an offeror shall be submitted to SBA pursuant to 13 CFR 125.24 through 125.28 (see http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/index.tpl and browse Title 13).

b. A protest relating only to an offeror's small business size status, but not to the offeror's SDVO status, shall be processed and submitted to SBA pursuant to 13 CFR Part 121.1001 through 121.1010 (see http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&tpl=/index.tpl and browse Title 13) and FAR 19.302.

c. A protest involving both the SDVO status and the small business size status of an offeror shall be submitted to SBA pursuant to 13 CFR 125.24 through 125.28, but SBA will process the two protests (SDVO status and small business size status) separately.

11. A sample joint venture agreement is enclosed (Attachment 2) for guidance. We recommend that the contracting officer submit each proposed joint venture agreement received to the appropriate Office of the General Counsel Regional Counsel and Acquisition Assistance Division for review and comment prior to approving the agreement. Please forward a copy of each approved SDVOSB joint venture agreement to VA's Office of Small and Disadvantaged Business Utilization (OSDBU) within 5 business days of such approval.

12. Please direct any questions concerning size standards, SDVO status, or SDVOSB certification to Deborah Van Dover, Senior Procurement Analyst, OSDBU, at (202) 565-7795. Please direct any questions concerning other issues addressed in this IL, including bonds, to Don Kaliher, Senior Procurement Analyst, Acquisition Policy Division, at (202) 273-8819.

C. Ford Heard
Director
Acquisition Resources Service

Attachments: 2

Distribution: RPC 7029

Related Comptroller General Decisions

In the Matter of: C & S Carpentry Services, Inc., B-253615, October 6, 1993, the Comptroller General determined that:

1. The agency reasonably determined that a joint venture comprised of a small disadvantaged business (SDB) and a non-SDB was ineligible to receive award of a contract set aside for SDB concerns where, although the joint venture agreement provided the SDB with a 51 percent interest, the SDB would not control the management and daily business operations of the project because the non-SDB joint venturer could effectively veto any action by the SDB; and

2. A firm must demonstrate status as a small disadvantaged business concern at the time of bid opening; post-bid opening amendment to the joint venture agreement changing the legal relationship of the joint venturers is immaterial for purposes of establishing status, since it cannot affect status as of bid opening.

In the Matter of: Arapaho Communications, Inc./Steele & Sons, Inc. Joint Venture, B-255330, February 8, 1994, the Comptroller General determined that:

An agency properly determined that a joint venture did not qualify as a small disadvantaged business (SDB) where the agency reasonably found that the SDB member of the joint venture did not control the management and daily business operations of the activity.

In the Matter of: D. H. Kim Enterprises, Inc., B-255199.2, B-255199.3, February 24, 1994, the Comptroller General determined that:

Under a solicitation set aside for small disadvantaged business (SDB) concerns, where the non-SDB and SDB participants of a joint venture have an "equal voice" in the management of the joint venture and must specifically agree to the management powers and duties to be delegated to the SDB managing party, the SDB participant does not have the requisite legal or management control over the enterprise; where the SDB participant lacks such management control, the fact that the SDB joint venturer holds a majority interest or receives a majority of profits of the enterprise is insufficient for the entity to qualify as an SDB concern.

JOINT VENTURE AGREEMENT TEMPLATE

This is only an outline document. Actual agreements may vary provided the agreements contain the essential elements required by 13 Code of Federal Regulations (CFR) Section 125.15 highlighted below. Every joint venture agreement to perform a contract set aside for service-disabled veteran-owned (SDVO) small businesses must contain the provisions shown in bold:

13 CFR 125.15b)(2)(i), setting forth the purpose of the joint venture.

Purpose

The purpose of the Joint Venture, consisting of [names of the participants], shall be to bid upon IFB/RFP [number] and, if successful, to enter into and perform the contract for [specify type of services] for the Department of Veterans Affairs [Name of VA facility]. The name of the Joint Venture is [state the name].

13 CFR 125.15b)(2)(ii), designating the SDVO small business participant as the managing venturer of the joint venture and naming an employee of the managing venturer as the project manager responsible for performance of the SDVO contract.

Project Manager

[Name of the service-disabled veteran-owned member company] shall be the managing venturer of the project. [Name of individual] has been selected as the Project Manager for this contract and is an employee of [the service-disabled veteran-owned member company]. He/she shall be responsible for contract performance, overseeing the job-site, reporting to and implementing the instructions of the VA Resident Engineer, preparing a daily written log detailing all developments and aspects of the job, and submitting such log to the VA Resident Engineer and Contracting Officer upon request.

13 CFR 125.15b)(2)(iii), stating that not less than 51% of the net profits earned by the joint venture will be distributed to the SDVO small business participant(s).

Profits

_____ percent [not less than 51 percent] of the net profits earned by the Joint Venture will be distributed to [name of the service-disabled veteran-owned

member company participant]. The net operating income and net operating loss of the venture shall be allocated and shared by the venturers in proportion to their percentage ownership interests. Each venturer's respective interest in the venture is [Name of each participant and the percentage ownership of each].

13 CFR 125.15b)(2)(iv), specifying the responsibilities of the parties with regard to contract performance, source of labor and negotiation of the SDVO contract.

13 CFR 125.15b)(3), requiring that the joint venture must perform the applicable percentage of work required by 13 CFR 124.510.

Contract Oversight

Any member of the venture has the right to visit the contract site to evaluate contract performance.

Responsibilities and Source of Labor

[Name of service-disabled veteran-owned member company] shall be responsible for [describe the portions of contract performance and source of labor that are the responsibility of the service-disabled veteran-owned member company]. [Name(s) of the other member(s)] shall be responsible for [describe the portions of contract performance and source of labor that are the responsibility of the other member(s) of the joint venture]. The following portions of the contract shall be performed by subcontract [describe the portions of the contract that will be subcontracted and the approximate percentage of the total contract for each portion]. The joint venture shall perform at least the following percentage of work [enter the applicable paragraph below but only if required by FAR clause 52.219-14, Limitations on Subcontracting] [See 13 CFR 124.510, 13 CFR 125.6]:

(1) Services (non-construction). 50 percent of the cost of the contract incurred for personnel with its own employees;

(2) Supplies or Products. 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials);

(3) General construction. 15 percent of the cost of the contract with its own employees (not including the cost of materials); or

(4) Special trade construction. 25 percent of the cost of the contract with its own employees (not including the cost of materials).

Negotiating the Contract

[Specify the responsibilities of the parties with regard to negotiation of the contract and any subsequent changes thereto.] [Name of the individual] will be responsible for negotiating the original contract, should negotiations be required by the Department of Veterans Affairs, and any subsequent negotiations required by the Department of Veterans Affairs.

Equipment

Itemize all major equipment, facilities, and other resources to be furnished by each party to the joint venture.

13 CFR 125.15b)(2)(v), obligating the parties to the joint venture to ensure performance of the SDVO contract and to complete performance despite the withdrawal of any member.

Ensured Performance

[Service-disabled veteran-owned member company's name] and [other member's name(s)] are jointly and severally liable to perform the contract and to complete performance despite the withdrawal of any party to the joint venture.

13 CFR 125.15b)(2)(vi), requiring the final original contractor records be retained by the managing venturer upon completion of the SDVO contract performed by the joint venture.

13 CFR 125.15b)(5), specifying that the Small Business Administration may inspect the records of the joint venture without notice at any time deemed necessary.

Books and Records

During contract performance, accounting and other administrative records, including the venture's books, and any other records relating to the joint venture and the contract shall be kept and maintained at the office of [the service-disabled veteran-owned member company's name]. Each venturer

shall, during regular business hours, have access to and may inspect and copy any and all such books and records. VA and the Small Business Administration shall have authority to inspect the records of the venture at any time without advance notice. Accounting and other administrative records, including the venture's books, and any other original records relating to the joint venture shall be kept and maintained at the office of [the service-disabled veteran-owned member company's name] after completion of the contract.

Integrated Agreement

Any changes to this agreement shall be in writing and approved by all parties to the agreement and a copy of each change shall be furnished to the VA contracting officer within 5 calendar days of approval by the parties.

Signatures, names, and titles of all participating parties to the joint venture

The signatures on the document should be notarized, but notarization may not be required if State law does not require notarization and other evidence of the validity of the signatures is provided to the contracting officer.