

## CLIENT ALERT

### DOJ Announces FCA Settlement Arising out of Violation of SBA's Joint Venture Requirements

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On February 25, 2021, the U.S. Attorney's Office for the Southern District of Illinois announced a settlement to resolve allegations that a contractor that was not an eligible participant in the Small Business Administration's 8(a) Business Development Program violated the False Claims Act by controlling a joint venture that claimed 8(a) status and won an 8(a) set-aside award.

#### Allegations

Following its own graduation from the 8(a) program, R&W Builders, Inc. and an 8(a) participant (Global Environmental, Inc.) formed a joint venture (Patriot Commercial Construction, LLC) that claimed 8(a) status.<sup>1</sup>

This joint venture won a Multiple Award Construction Contract (MACC) at Scott Air Force Base, Illinois that had been set-aside for 8(a) participants. The joint venture went on to win more than 30 task orders under this MACC with a combined value of about \$8 million.

The SBA's joint venture program requires that a joint venture agreement in these circumstances include specific terms, including but not limited to, that the 8(a) participant will be the managing partner of the joint venture and that the 8(a) participant will perform a specified percentage of work awarded to and performed by the joint venture. Here, the government alleged that R&W falsely represented that it would comply with the 8(a) Program requirements in order to gain SBA's approval of the joint venture (which was required at the time for a joint venture's participation for all 8(a) work). Per this press release, immediately after the joint venture "received an 8(a) award on the MACC, R&W began managing the joint venture and using its own employees to complete nearly all of the work [the joint venture] performed." Over a two-year period, R&W purportedly caused the joint venture "to receive numerous MACC task orders set aside for 8(a) Program participants when [the joint venture] was under R&W's control, in violation of SBA requirements."

#### Settlement

The settlement is the result of a government investigation conducted by the SBA Office of Inspector General, Department of Defense Office of Inspector General, Air Force Office of Special Investigations, and the Defense Contract Audit Agency. R&W Builders has agreed to pay \$400,000 to settle the allegations.

#### Takeaways

The 2016 rollout of the SBA's All-Small Mentor-Protégé Program dramatically increased the number of entities eligible to form a joint venture in order to bid on opportunities set-aside for small businesses. Since then, focus has been placed on ensuring that

a joint venture agreement addresses all facets required by the SBA's regulations in advance of proposal submission for a set-aside procurement in the event that the joint venture's size eligibility is challenged.

But this settlement highlights that it is important to not only have a compliant joint venture agreement at time of proposal submission, but also to ensure that the parties continue to comply with terms of the joint venture agreement following award of a set-aside contract. Here, the government alleged two non-compliances: first, that the non-8(a) member controlled the joint venture, and, second, that the 8(a) entity did not perform the minimum work the 8(a) entity was required to perform. These are just two of many requirements that a joint venture—and its members—must comply with.

The FCA hook in DOJ's allegation against R&W is that, R&W falsely represented it would comply with the requirements to gain SBA's approval of the joint venture. While SBA's joint venture regulations no longer require SBA approval of the joint venture agreement (except in the case of 8(a) sole source awards), SBA has layered in express certifications of compliance with the SBA joint venture requirements—not only for awards reserved for 8(a) joint ventures but also for awards reserved for small businesses, SDVOSBs, WOSBs, and HUBZone small business concerns—at every stage of the process. Therefore, removal of SBA's advance approval of a joint venture agreement for 8(a) set-asides does not eliminate the risks associated with non-compliance for joint ventures claiming any small business size and/or status.

Specifically, in connection with any contracts set-aside or reserved for small businesses or businesses of particular statutes, joint ventures must submit:

1. **Pre-Performance Certificate of Compliance:** The small business protégé must submit a written certification to the CO and the SBA—signed by authorized officials of each partner to the joint venture—explaining how (1) the parties entered into a joint venture agreement that fully complies with the relevant SBA joint venture requirements; and (2) the parties will perform the contract in compliance with the joint venture agreement and with the performance of work requirements.
2. **Annual Performance of Work Reports:** Annually, the small business protégé must submit a report to the CO and the SBA—signed by authorized officials of each partner to the joint venture—explaining how the performance of work requirements are being met.
3. **Contract Closeout Performance of Work Reports:** At the completion of each contract, the small business protégé must submit a report to the CO and the SBA—signed by authorized officials of each partner to the joint venture—explaining how and certifying that the performance of work requirements were met for the contract as well as certifying that the contract was performed in accordance with the provisions of the joint venture agreement.

We expect that as the number of joint ventures winning set-aside and sole source awards on the basis of small business size and/or status continues to grow, focus will turn to ensuring these joint ventures satisfy all the varied—and shifting—requirements laid out by the SBA concerning aspects such as control and workshare split between joint venture partners.

Below are some considerations that those in joint ventures claiming small business size and/or status should consider:

- Is the Joint Venture currently complying with the Joint Venture Agreement as drafted – *i.e.*:
  - Is the Joint Venture meeting all of the reporting requirements included in the Joint Venture Agreement?
  - Are the records of the Joint Venture being maintained in the manner provided for in the Joint Venture Agreement?

- Is the Responsible Manager managing contract performance as contemplated by the Joint Venture Agreement?
- If the Joint Venture Agreement spell out roles and responsibilities of the parties for back office support (such as human resources, facility security clearance, business development), are the members complying with those provisions?
- If the Joint Venture Agreement calls for the members to invoice the Joint Venture for back office support work, are the members invoicing the Joint Venture as contemplated in the Joint Venture Agreement?
- Does the Joint Venture Agreement and/or Operating Agreement provide for regular meetings of the members and/or representatives of the members? If so, are those meetings happening? Are notes being kept to document what was discussed and any votes taken?
- Is the Joint Venture updating the Joint Venture Agreement as necessary?
  - Does the Joint Venture Agreement address the responsible manager, source of major equipment/facilities/other resources, source of labor, contract performance, etc. for each opportunity that the Joint Venture is bidding on?
  - For contracts for which the statement of work was not available at time of initial proposal submission and for which the Joint Venture could not definitize the source of major equipment/facilities/other resources and/or labor, is the Joint Venture complying with the process by which the parties are supposed to split up such responsibilities on an order by order basis?
  - What documentation, if any, does the Joint Venture intend to generate with respect to the submission of task or delivery order proposals?
- If the Joint Venture has won work that was previously performed by the mentor under an incumbent contract, has the work been properly transitioned to the Joint Venture's (and the Managing Venturer's) control?
- For multiple-award IDIQs—such as the one at issue in R&W—and GWACs, who in practice is controlling the Joint Venture's efforts to win and perform the work?

Crowell & Moring will continue to monitor and report on developments with respect to SBA's Mentor-Protégé Program and the ability of mentors and protégés to joint venture pursuant to such an agreement.

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<sup>1</sup> Note, the press release does not specify whether this joint venture was entered into pursuant to an SBA-approved mentor-protégé relationship or merely under the authority provided at 13 C.F.R. § 124.513 for an 8(a) participant to joint venture with one or more other business concerns so long as each concern is small for the NAICS code assigned to the procurement. Regardless of the means by which the joint venture qualified for the contract at issue, the takeaways remain the same.

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