PILIERO MAZZA PLLC
ATTORNEYS AT LAW

888 17th St. NW, 11th Flr.
Washington, DC 20006
Tel: 202.857.1000
Fax 202.857.0200

"THE INS AND OUTS OF JOINT VENTURE AGREEMENTS"

November 10, 2011

DoD Mid-Atlantic Regional Counsel

Steven J. Koprince

WHAT IS A JOINT VENTURE?

- A joint venture is:
  - "A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally."

TEAMING AGREEMENT *VS.* JOINT VENTURE

- **Liability**
  - JV partners jointly responsible for contract performance, and except in LLC, jointly and severally liable
  - Subcontractor only responsible for portion of work it performs, limited liability
- **Control**
  - Shared by JV partners
  - Prime Contractor has control over teaming relationship
- **Bonding**
  - JVs typically able to obtain bonding based on combination of all partners
  - Prime/sub may work also, but likely requires agreement of all parties to be bound and collateral from owners

ADVANTAGES OF A JOINT VENTURE?

a. The Government can look to the resources of two (or more) companies to perform the work;

b. A minority joint venture member can exert more control over contract performance to protect its interests than in a traditional prime-sub relationship;

c. The joint venture parties receive favorable partnership income tax treatment;

d. Participating in a joint venture may allow a company to avoid any perceived stigma associated with being a subcontractor to its competitors; and

e. Allows firms to stay smaller longer.

DISADVANTAGES OF A JOINT VENTURE?

a. Lead Contractor gives up substantial control;

b. The participating contractors become joint and severally liable to third parties for the acts of their joint venture partners, including criminal acts;

c. The Government may view the JV as lacking a clear point of contact, thus raising concerns regarding control, authority, and accountability;

d. Terminating a JV may be more difficult than terminating a subcontract agreement while the prime contract is being performed; and

e. Competitors may raise past performance questions.

TIMING OF JOINT VENTURE RELATIONS

1. Joint Ventures should normally be formed before the offer is submitted.
2. Agreement should provide for performance of the contract – avoid "agreement to form a joint venture".

ABOUT JOINT VENTURES

A. **Main Characteristics:**
   1. Co-management
   2. Sharing profits and losses
   3. Limited duration

B. **Competing as a joint venture:**
   1. Joint ventures should be formed before submitting offer
   2. Agreement should provide for contract performance
   3. FAR requires disclosure in the proposal

C. **Forms of Joint Venture:**
   1. Partnership
   2. Limited Liability Company
   3. Corporation (more formalities)

STRUCTURING A JOINT VENTURE

- Form of Joint Venture
  - Traditional Joint Venture (partnership)
    - Can be informal
      - No employees for JV itself
    - Legal Risk
- Alternative
  - Limited liability company
    - Advantages – easy to form; limited liability for partners
    - Disadvantages – requires capitalization and operation as separate entity
  - Corporation (more formalities)

STRUCTURING A JOINT VENTURE (cont'd)

- **Corporation**
  - The formation of a corporation requires the most formalities including, meeting requirements, state filing requirements, etc.
- **Other considerations:**
  1. Populated v. unpopulated joint ventures
  2. Limitations on Subcontracting
  3. Avoiding “general” affiliation

JOINT VENTURE: MANAGEMENT STRUCTURE AND LABOR

- What will be the management structure of the Joint Venture?
  - Management Committee?
  - Project Manager?
- Which party will be responsible for negotiating contracts?
- Which party will be responsible for negotiating subcontracts with subcontractors?
- What are the sources of labor to be employed?
- How do the parties envision the division of labor on contracts?

GENERAL PROVISIONS THAT MUST BE INCLUDED IN MOST JOINT VENTURE AGREEMENTS

- **Purpose of the Joint Venture.**
- **Designation of SBC as managing venturer.**
- **Certain percent of net profits earned by Joint Venture will be distributed to the SBC participant.**
- **Responsibilities of the parties.**
- **Obliging parties to Joint Venture to ensure performance of government contract.**
- **Designation that accounting/administrative records are kept by managing venturer and requirement that managing venturer retain records of contracts completed by Joint Venture.**
- **Performance of Work.**
- **Inspection of Records.**

LIMITED LIABILITY COMPANY

PROS:

1. **Liability** – *Members not liable (beyond capital contributions) to third parties for actions of the LLC.*
2. **Taxes** – *May be treated as partnership (or like an S Corp) for tax purposes.*
3. **SBA** - *recognizes LLC as structure through which to operate joint venture.*

CONS:

1. **Liability** – *individual members remain responsible to government for performance of contract under SBA regulations.*
2. **Documentation** – *Articles of Organization and Operating Agreement need to be drafted.*
3. **Past Performance** - *no past performance record of its own unless the solicitation allows members past performance history to be considered.*
4. **SBA** – *the regulations do not contemplate LLC structure, making it difficult to operate within regulations.*

JOINT VENTURE PARTNERSHIP

PROS:

1. **Taxes** – *Treated as a partnership (or like an S Corp) for tax purposes.*
2. **Bid and Proposal Costs** – *recoverable by individual members.*
3. **SBA** – *Structure with which the SBA is most familiar, making the review process less time consuming.*

CONS:

1. **Liability** – *Partners are jointly and severally liable on debts of the partnership.*
2. **Documentation** – *Joint Venture Agreement necessary for 8(a) purposes; serves as partnership agreement.*
3. **Past Performance** – *no past performance record of its own unless the solicitation allows members past performance history to be considered.*

JOINT VENTURES: SMALL BUSINESS SET ASIDES

A. The Joint Venture receive up to three contracts within 2 years

B. "Individual size treatment rule" if contract:

   1. Exceeds ½ of revenue-based size standard; or

   2. Exceeds $10M (employee-based size standard)

JOINT VENTURES: 8(a) SET ASIDES

A. Government can award 8(a) contracts to JV if:

1. One firm is 8(a) certified and ½ the size standard
2. All partners are SBs, unless in Mentor-Protégé

B. The SBA must approve the JV agreement

1. 8(a) firm must manage
2. 8(a) firm must furnish project manager
3. 8(a) firm must receive profits commensurate with work

C. Competing as a JV – best practices

1. JV should be formed before submitting offer
2. Agreement should provide for contract performance

JOINT VENTURES: HUBZONE CONTRACTS

A. All partners must be HUBZone.

B. All partners must be <u>small</u>.

C. The <u>contract</u> must meet certain size requirements.

JOINT VENTURES: SDVOSB CONTRACTS

A. Managing partner must be SDVOSB.

B. All partners must be small.

C. 51% or more of profits must go to SDVOSB.

D. LLC option no longer questionable

- OHA Decision overturning prior interpretation

SUBCONTRACT LIMITATIONS

- Performance of work under joint ventures.
- Work of joint venture counts towards subcontracting limitations.
- Division of work within joint venture.

ANY QUESTIONS?