

Mentor-Protégé Program Joint Venture Agreement Guide

The following is a guide to assist in developing a comprehensive joint venture agreement in compliance with the requirements of Title 13 of the Code of Federal Regulations, sections 124.513, 125.8, 125.9, 125.18, 126.616, and 127.506 (13 C.F.R. §§ 124.513, 125.8, 125.9, 125.18, 126.616, and 127.506). This language is being provided by the U.S. Small Business Administration (“SBA”) to better assist firms seeking to create Joint Venture Agreements to pursue Federal Government contracts as small businesses. Usage of the provided language is not mandatory – each agreement should be tailored to represent the agreement between the relevant parties. Parties to any agreement are responsible for the terms and conditions therein and SBA recognizes that additional language is likely required in order to meet the compliance requirements of specific jurisdictions. Please note that SBA does not approve Joint Venture Agreements (“JVA”) created pursuant to an approved Mentor-Protégé Agreement (whether approved through the All Small Mentor-Protégé Program (ASBMPP) or the 8(a) Business Development (BD) Program) unless the Joint Venture is pursuing an 8(a) contract. Should there be any type of size protest, SBA will scrutinize all JVAs between the parties, including the specificity of the provisions, to make sure they comply with SBA regulations and the intent of the mentor-protégé program. Non-compliant agreements could result in a finding of affiliation between the parties. In such a case, the joint venture would be ineligible for a contract set aside or reserved for any small business program (“Small Business Contract”) where the aggregate size of the joint venture parties exceeds the size standard corresponding to the NAICS Code assigned to the Small Business Contract.

Please note that any agreement, amendments, or addendums to the agreement must comply with the Small Business Act, SBA regulations, information notices or other guidance governing and/or controlling the mentor-protégé program. If any provision of the organizational documents (i.e., Operating Agreement), the Joint Venture Agreement or Addendums are in conflict with or prohibited by the Small Business Act, SBA regulations, information notices or other guidance governing and/or controlling the mentor-protégé program, those provisions shall be null and void and/or interpreted in a manner that is in compliance with the SBA regulations and/or guidance governing the SBA mentor-protégé program.

When drafting a JVA, it is the responsibility of the parties to the joint venture to fully understand the agreement being entered into, the type of business entity (e.g., limited liability company, partnership, etc.) being created, the relationship among the parties, and compliance with the applicable rules and regulations. It is imperative that you review the state regulations to be in compliance with state specific filings and requirements for business organizations. Prospective parties to a JV may also wish to obtain legal counsel to review the contents of any agreement. SBA cannot guarantee that an agreement which contains the language in the attached template will be enforceable in every jurisdiction or compliant with the applicable rules and regulation

HOW TO USE THIS GUIDE:

This Guide is meant to be used in conjunction with the attached JVA Sample Template. The Template is being provided as a separate document to provide an example of a completed JVA.

The following sections in this Guide list specific provisions that should be included in a SBA-compliant JVA. Where specifically required by regulation, the applicable regulatory citation has been provided. These numbered sections correspond to the numbered sections in the attached JVA Template – it is not necessary that the same numbering system be used. In some cases, additional sample language has been provided in the sections below. Both the JVA Template and the sample language below are merely examples of provisions SBA would deem to be compliant with SBA’s applicable rules and regulations. This language can and should be tailored to reflect the actual intent and agreement between the parties.

Section 1.0 Purpose:

SBA’s regulations (13 C.F.R. §§ 124.513(c)(1), 125.8(b)(2)(i), 125.18(b)(2)(i), 126.616(c)(1), and 127.506(c)(1)) require all JVAs to include a provision setting forth the purpose of the Joint Venture (“JV”). This provision should:

- State the purpose of the business entity being formed;
- Include the type of joint venture being formed (i.e., the business structure being adopted);
- Provide the solicitation number of the contract for which the joint venture is bidding, if the joint venture is being formed in response to a specific solicitation, or describe the type of contract opportunities that the joint venture will pursue generally if it is not being formed in response to a specific solicitation; (if the joint venture is not being formed in response to a specific solicitation, the parties to the joint venture must approve an addendum to the joint venture agreement that describes the purpose and contemplated performance of work for each contract opportunity pursued by the joint venture);¹
- and
- List the powers of the business entity.

This provision should also state the name of the joint venture being created. Keep in mind that some jurisdictions require certain business entities to have specific language in the name in order to properly identify the type of entity being formed. For example, a business organization formed as a Limited Liability Company should contain the identifier of LLC in the name. The agreement must identify the legal name of the entity and doing business name (D.B.A.) if applicable and provide that any resulting contracts will be executed under this name.

¹ A specific JV cannot exceed more than two years. If it is longer than that, then it is considered an on-going business entity and the parties would be generally affiliated (aggregated for all purposes).

Example of purpose of a joint venture formed as a limited liability company:

The purpose of this Joint Venture limited liability company is to submit an offer upon solicitation number RFP [*Insert RFP Number*], and to perform any work stemming from a contract awarded by [*Department or Agency Name*].in response to the solicitation.

. The powers of the Joint Venture are as follows:

- (1) To sue and be sued, complain and defend in its name;
- (2) To make contracts and guaranties, incur liabilities, borrow money, issue its notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises or income;
- (3) To have and exercise all powers necessary or convenient to affect any or all of the purposes for which the limited liability company is organized.

Section 2.0 Management:

SBA’s regulations (13 CFR §§ 124.513(c)(2), 125.8(b)(2)(ii), 125.18(b)(2)(ii), 126.616(c)(2), and 127.506(c)(2)) require all JVAs to include a provision designating the small business as the Managing Venturer of the Joint Venture and an employee of the small business managing Venturer as the project manager responsible for performance of the Contract. In order to demonstrate control, this provision should describe how management decisions will be made (i.e., who can vote, how actions will be taken, whether the powers to control and manage the joint venture can be delegated, how the managing Venturer’s presence is required to obtain a quorum, etc.). This provision should also state that all decisions need approval of the managing Venturer.

The JVA must appoint a project manager. A specific individual’s name need not be provided; however, the project manager must be an employee of the Protégé Participant and under the control of the Protégé Participant partner to the joint venture. State the process by which the joint venture will replace the project manager. The authority to remove and/or replace a project manager must lie with the managing Venturer. State that the project manager will perform the day-to-day management and administration of the Small Business Contract.

Example of management of a joint venture formed as a limited liability company:

[Insert Protégé Participant Name], the Protégé Participant, is the Managing Venturer of the Joint Venture. The Managing Venturer will make all decisions regarding the management of the joint venture, with the exception of those requiring the consent of a majority of the members. Any member wanting to bring a management decision to the attention of the Managing Venturer can call a meeting of the members. Notice of the meeting must be given in the following manner: [Insert Manner in which to give notice of the meeting]. The meeting must be held at [Fill in Meeting Location]. Notice must be given [Insert number of days ahead of time notice must be

given] days ahead of time. The presence of the Managing Venturer is required to make a decision.

Project Manager: [Insert Name of Project Manager], an employee of the Managing Venturer, is the Project Manager of this Joint Venture. This individual is responsible for performance of the Small Business Contract, overseeing the jobsite, and reporting to and implementing the instructions of the Managing Venturer. The Project Manager will perform the day-to-day management and administration of the Small Business Contract.

Section 3.0 Ownership:

SBA's regulations (13 CFR §§124.513(c)(3), 125.8(b)(2)(iii), 125.18(b)(2)(iii), 126.616(c)(3), and 127.506(c)(3)) require all JVAs to include a provision stating that with respect to a separate legal entity joint venture, the small business owns at least 51% of the joint venture entity. This provision should explicitly state the ownership interest of the parties in the business entity with the managing Venturer owning a minimum of fifty-one percent (51%) of the joint venture entity.

Example of ownership interest of a joint venture:

The Managing Venturer, [Insert Name of Managing Venturer], has an ownership interest of in the "Joint Venture."

Section 4.0 Profit/Losses:

SBA's regulations (13 CFR §§ 124.513(c)(4), 125.8(b)(2)(iv), 125.18(b)(2)(iv), 126.616(c)(4), and 127.506(c)(4)) require all JVAs to include a provision stating that each participant must receive profits from the joint venture commensurate with the work performed by the concern.

Example of profits/losses of an unpopulated joint venture:

The Venturers will receive profits and losses from the Joint Venture commensurate with the work they perform under the Small Business Contract of the Joint Venture.

Section 5.0 Bank Account:

SBA's regulations (13 CFR §§ 124.513(c)(5), 125.8(b)(2)(v), 125.18(b)(2)(v), 126.616(c)(5), and 127.506(c)(5)) require all JVAs to include a provision providing for the establishment and administration of a separate bank account in the name of the joint venture. This account must require the signature of all parties to the joint venture or designees for withdrawal purposes. This provision should state all payments due for the performance of the joint venture will be deposited in this account and all expenses incurred under the Small Business Contract will be paid from the account.

Example of bank account provision of a joint venture:

The operating account will be at [Insert Name of Bank], located at [Insert Bank's Address].

The operating account will be established in the name of the Joint Venture, “[Insert Joint Venture Name].” All receipts of the Joint Venture will be deposited into its operating account. All expenses incurred under the Small Business Contract will be paid from its operating account. Each of the Venturers will designate, in writing, the persons who may sign on its behalf.

Section 6.0 Major Equipment, Facilities, and Other Resources:

SBA’s regulations (13 CFR §§ 124.513(c)(6), 125.8(b)(2)(vi), 125.18(b)(2)(vi), 126.616(c)(6), and 127.506(c)(6)) require all JVs to include a provision 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. This provision should include the cost or value of these resources. If cost or value is uncertain, provide an educated estimate of what it will be, and state that it is an estimate and how the amount was determined. If the contract is for services only and no equipment, facilities or other resources will be furnished, provide a statement attesting to the fact that no equipment, facilities or other resources will be provided.

Example of equipment provision of a joint venture:

Upon award of the Small Business Contract, the Managing Venturer and the Partner Venturer will provide the following equipment, facilities, and other resources to the Joint Venture.

The Managing Venturer will provide:

Equipment: [Describe Equipment]

Facilities: [Describe Facilities]

Other resources: [Describe the Other Resources]

The Partner Venturer will provide:

Equipment: [Describe Equipment]

Facilities: [Describe Facilities]

Other resources: [Describe Other Resources]

Sections 7.0, 8.0 and 9.0 Contract Performance:

SBA’s regulations (13 CFR §§ 124.513(c)(7), 125.8(b)(2)(vii), 125.18(b)(2)(vii), 126.616(c)(7), and 127.506(c)(7)) require all JVs to include a provision specifying the responsibilities of the parties with regard to the 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 small business partner(s) to the joint venture will meet the performance of work requirements set forth in 13 CFR §§ 124.510, 125.8(c), 125.18(b)(3), 126.616(d), and 127.506(d). This provision should include a detailed staffing plan describing the name/titles of employees, job description,

employer, etc. If names and titles of specific individuals are not yet available, the agreement must state that the individuals will be under the control of the Protégé Participant to the joint venture. Please note that the joint venture itself can only employ administrative staff – the individuals who perform work related to the Small Business Contract must be employees of the Managing Venturer, Partner Venturer(s) or subcontractors.

Example of contract performance of a joint venture:

Source of Labor. Attached is a staffing plan outlining the method of maintaining a labor pool throughout the duration of the performance of the Small Business Contract.

The Managing Venturer will perform [*describe services*]. The Partner Venturer(s) will perform [*describe services*].

Section 10.0 Ensured Performance:

SBA's regulations (13 CFR §§ 124.513(c)(8), 125.8(b)(2)(viii), 125.18(b)(2)(viii), 126.616(c)(8), and 127.506(c)(8)) require all JVAs to include a provision obligating all parties to the joint venture to ensure performance of the contract and to complete performance despite the withdrawal of any member.

Example of ensured performance provision of a joint venture:

Each of the Venturers individually agrees to ensure performance of the Small Business Contract and to complete performance despite the withdrawal of any member. The individual parties to the joint venture will be responsible for the complete performance of the contract.

Section 11.0 Administrative Records:

SBA's regulations (13 CFR §§ 124.513(c)(9), 125.8(b)(2)(ix), 125.18(b)(2)(ix), 126.616(c)(9), and 127.506(c)(9)) require all JVAs to include a provision designating that accounting and other administrative records relating to the joint venture be kept in the office of the small business managing Venturer, unless approval to keep them elsewhere is granted by the SBA.

Example of Accounting and Administrative Records provision of a joint venture:

Accounting and other administrative records relating to the Joint Venture will be kept in the offices of the Managing Venturer, unless written approval to keep them elsewhere is granted by the SBA District Director or his/her designee upon written request.

Section 12.0 Retention of Records

SBA's regulations (13 CFR §§ 124.513(c)(10), 125.8(b)(2)(x), 125.18(b)(2)(x), 126.616(c)(10), and 127.506(c)(10)) require all JVAs to include a provision requiring that the final original records be retained by the small business managing Venturer upon completion of any contract set aside or reserved for small business that was performed by the joint venture.

Example of Final Original Records provision of a joint venture:

Upon completion of the Small Business Contract, the final records of the Joint Venture will be retained by the Managing Venturer.

Section 13.0 Quarterly Financial Statements

SBA's regulations (13 CFR §§ 124.513(c)(11), 125.8(b)(2)(xi), 125.18(b)(2)(xi), 126.616(c)(11) and 127.506(c)(11)) require all JVAs to include a provision 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.

Example of Quarterly Financial Statements provision of a joint venture:

Quarterly financial statements showing cumulative Small Business Contract receipts and expenditures (including salaries of the Joint Venture's principals) will be submitted to the SBA no later than forty-five (45) days after the end of each operating quarter of the Joint Venture.

Section 14.0 Project-End Statements

SBA's regulations (13 CFR §§ 124.513(c)(12), 125.8(b)(2)(xii), 125.518(b)(2)(xii), 126.616(c)(12) and 127.506(c)(12)) require all JVAs to include a provision 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.

Example of Project-End Profit and Loss Statement provision of a joint venture:

A project-end profit and loss statement, including a statement of final profit distribution, will be submitted to the SBA no later than ninety (90) days after completion of the Small Business Contract. No specific format required.

Section 15.0 Performance of Work

SBA's regulations (13 CFR §§ 124.510, 125.8(c), 125.18(b)(3), 126.616(d), and 127.506(d)) require all JVAs seeking a small business contract to include a provision stating the joint venture must perform the applicable percentage of work required by 13 C.F.R. §125.6, and the small business partner to the joint venture must perform at least 40% of the work performed by the joint venture.

Section 16.0 Certification of Compliance

SBA's regulations (13 CFR §§ 124.513(j), 125.8(d), 125.18(b)(4), 126.616(e), and 127.506(e)) require all JVAs to include a provision stating that prior to the performance of any contract set aside or reserved for small business the small business partner to the joint venture must submit a written certification to the contracting officer and SBA.

Section 17.0 SBA Inspection Rights

SBA's regulations (13 CFR §§ 124.513(i), 125.8(g), 125.18(b)(7), 126.616(h), and 127.506(i)) require all JVAs to include a provision stating that the joint venture must allow SBA's Authorized Representative to inspect the records of the Joint Venture at any time.

Section 18.0 Performance of Work Reports

SBA's regulations (13 CFR §§ 124.513(k), 125.8(h), 125.18(b)(8), 126.616(i), and 127.506(j)) require all JVAs to include a provision stating that the joint venture must provide performance of work reports to SBA.

Section 19.0 Miscellaneous:

While not required, SBA recommends that you consider addressing the following issues in drafting your JVA. While the parties undoubtedly hope for a successful relationship, not all joint ventures end positively. SBA recommends that the parties contemplate how the agreement should be interpreted and how disputes between the parties will be resolved. The JVA Template and sample language below provide examples of how some issues might be addressed. As always, this language should be tailored to the parties' needs and should comply with state and local law.

Conflicts of Law Example: "It is the intent of the parties of this Agreement to comply with all the laws, rules and regulations, information notices and guidance governing/concerning joint ventures formed under the authority of 13 C.F.R. § 125.8 (or § 124.513, § 125.18, § 126.616 or § 127.506, as applicable). If any provision contained in this agreement is in conflict with or prohibited by SBA rules, regulations, information notices or guidance concerning joint ventures, such provision(s) shall be null and void ab initio or interpreted in a manner that is consistent with SBA rules, regulations, information notices or guidance."

Dispute Resolution Example: “The mediator, arbitrator, or disinterested party will not have the authority to make a finding, ruling, or enter an order that would be in conflict with or prohibited by SBA regulations, guidance, or information notices governing joint ventures. Any ruling or finding by the mediator, arbitrator, or disinterested party that amends the joint venture agreement must be approved by SBA. If not approved by SBA said ruling(s) or finding(s) shall have no effect.”