

HOW TO FORM TEAMING AGREEMENTS AND STRATEGIC PARTNERSHIPS

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OVERVIEW

- ❖ Teaming
- ❖ Subcontracting
- ❖ Joint Ventures
- ❖ Q&A



CURRENT CLIMATE

- ❖ Transparency
- ❖ Contractor codes of ethics
- ❖ Self reporting requirements
- ❖ Contractor performance assessment reviews
- ❖ Audits and investigations
- ❖ Presumed Loss Rule



WHY COMPANIES TEAM A STRATEGIC DECISION . . .

- ❖ **For Primes**
 - Enhances competitive posture
 - Share risk
- ❖ **Prime Contractor Team Role**
 - Responsible for fulfillment of contract requirements to the Government customer
- ❖ **For Subcontractors**
 - Capture new business with less risk
 - Increase market access
 - Ineligible as a Prime Contractor
- ❖ **Subcontractor Team Role**
 - Responsible to the Prime Contractor for fulfillment of the requirements of a Subcontractor



DUE DILIGENCE IS CRITICAL

- ❖ **Avoid the temptation to get on any team and at any cost**
- ❖ **Carefully and thoroughly screen prospective teammates**
 - **History of being a good teaming partner? Ask for references**
 - **Record of being fair, equitable, collaborative, and flexible in teaming relationships**
 - **Attitude of mutual dependence and benefit**
 - **Unblemished reputation with the Agency**
 - **Strong technical capabilities to fulfill elements of the Statement of Work (SOW)**
 - **Proven record of covering elements of the SOW**
 - **Positive name recognition with the customer**
 - **Cost competitiveness**
 - **Proposal support resources**
 - **Strong infrastructure support**



DOES THE PRIME CONTRACTOR SATISFY THE ELIGIBILITY REQUIREMENTS?

- ❖ **Is this a Small Business Set Aside?**
 - Ask – Is the prospective Prime Contractor small under the relevant size standards?
 - Average annual revenues over previous three fiscal years
 - Proper number of employees
 - Presumed Loss Rule considerations

- ❖ **Affiliation concerns?**



DOES THE PRIME CONTRACTOR SATISFY THE ELIGIBILITY REQUIREMENTS? (CONT'D)

- ❖ Is the Set Aside for
 - 8(a) companies
 - In good standing?
 - Meeting business mix targets?
 - HUBZone companies
 - Is the principal business in a HUBZone?
 - Do 35% of employees reside in a HUBZone?
 - Service-Disabled Veteran-Owned Small Businesses (SDVOSBs)
 - Does the Service-Disabled Veteran own 51% or more?
 - Control the company?
 - Manage the day-to-day operations?



AFFILIATION FOR FEDERAL CONTRACTS: OSTENSIBLE SUBCONTRACTOR RULE

- ❖ Unusual reliance on Subcontractor
- ❖ Totality of the circumstances – Factors to be considered:
 - Which party will manage the contract?
 - Are there discrete tasks to be performed by each party or is there a commingling of personnel?
 - Which party performs more complex and costly contract functions?
 - Which party possesses the requisite background and experience to carry out the contract?
 - What degree of collaboration was there on the bid or proposal preparation?
 - Which party “chased” the contract?
 - What is the amount of work to be performed by each?



OTHER FACTORS WHEN THE INCUMBENT IS ON YOUR TEAM

- ❖ Identification of the concerns as a “Team” – No longer a concern
- ❖ Hiring of now-large incumbent’s project management team and subcontracting a significant portion of the contract to the incumbent
- ❖ Challenged concern’s lack (and Subcontractor’s possession) of qualifications relevant to the contract requirements



TEAMING AGREEMENTS

- ❖ Once partners are selected, prepare and sign a Teaming Agreement
- ❖ What is a Teaming Agreement?
 - An agreement to compete together to win a specific procurement
- ❖ Must be legally enforceable, not an agreement to agree
- ❖ Be as specific as possible
- ❖ If you win, you need a subcontract



TEAMING AGREEMENTS, CONT'D

- ❖ Documents: intentions, expectations, and responsibilities
– Pertaining to a SPECIFIC procurement
- ❖ Entered into between Prime Contractor and each individual teaming partner
- ❖ Roles and responsibilities of the Prime Contractor are clearly defined
- ❖ Roles and responsibilities of each teaming partner are clearly defined



SPECIFIC TERMS

- ❖ Avoid ambiguities – Meeting of the minds
- ❖ Common clauses:
 - Identify the requirement
 - Establish why the parties are teaming
 - No affiliation – Independent Contractors
 - Proposal support resources
 - Roles of the parties during proposal preparation and evaluation
 - Proprietary information
 - Division of work (areas and percentages)
 - Assignment
 - Termination
 - Exclusivity/noncompete
 - Nonsolicitation/hiring of employees
 - Disputes
 - Governing law



DIVISION OF WORK

- ❖ **Expectations should be agreed to with as much specificity as possible**
 - **Type of work**
 - **Amount of work**
 - **Performance of SPECIFIC elements of SOW**
 - **Performance of minimum/maximum percentage of dollar value of the work**
 - **Continuity of work during the contract period of performance and beyond**



SUBCONTRACT AGREEMENTS

- ❖ Teaming Agreement should pave the way for the subcontract
- ❖ Carefully define duration, options, modifications, extensions, and follow-on work
- ❖ Deliverables and timeframe – Identify:
 - What are the deliverables?
 - Delivery schedule to Prime Contractor, then the Government
- ❖ Include FAR termination clause
- ❖ Choice of law/venue
- ❖ Presumed Loss Rule considerations



SUBCONTRACT AGREEMENTS: KEY CLAUSES

- ❖ **Subcontract Agreements – Include:**
 - Same provisions from Teaming Agreement
 - Additional performance details
- ❖ **Scope of work – Identify SOW sections applicable to Contractor**
- ❖ **Flow down provisions**
- ❖ **Identify PM role for agency relations**
- ❖ **No assignment/lower-tier subcontracting**



SUBCONTRACT AGREEMENTS: PAYMENTS

- ❖ Clearly define when payment is due
- ❖ Define invoice procedure
- ❖ Limit travel and include the applicable per diem
- ❖ Right of audit
- ❖ Specify procedure in case the Government disallows Sub's costs
- ❖ Escrow accounts



RECENT SBA FINAL RULE: SMALL BUSINESS SUBCONTRACTING

- ❖ Effective August 15, 2013
- ❖ For “covered contracts,” a prime contractor must notify the CO in writing whenever the prime contractor does not utilize a small business subcontractor used in preparing its bid or proposal during contract performance
 - Subcontractors can inform COs of violations of this requirement
 - “Covered contracts” are those which a small business subcontracting plan is required



SMALL BUSINESS SUBCONTRACTING: REPORTING REQUIREMENTS

- ❖ Prime contractor must notify a CO in writing whenever the prime reduces payments to a small business subcontractor or when payments to a small business subcontractor are 90 days or more past due
- ❖ CO responsible for monitoring and evaluating small business subcontracting plan performance
- ❖ Clarifies which subcontracts must be included in subcontracting data reporting and how data should be reported



NAICS CODE ASSIGNED TO SUBCONTRACT

- ❖ Large prime contractors are responsible for assigning NAICS codes and corresponding size standards to subcontracts
 - Should use guidance in SBA's regulations governing CO's assignment of NAICS codes to prime contractors
 - Prime contractors may rely on the representations made in subcontractors' SAM profiles, but may not make SAM registration a requirement for size or socioeconomic representation at the subcontract level



UTILIZATION OF SMALL BUSINESS SUBCONTRACTOR

- ❖ Prime contractor deemed to have “used” a small business subcontractor in preparing its bid or proposal when:
 - (1) the offeror specifically references a small business in the bid or proposal
 - (2) the offeror has a subcontract or agreement in principle with the small business concern to perform a portion of the specific contract, or
 - (3) the small business concern drafted portions of the proposal or the offeror used the small business concern’s pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence (including email) of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract



WHAT IS A JOINT VENTURE?

❖ **A Joint Venture is:**

An association of individuals and/or concerns to combine their property, capital, efforts, skills, and knowledge to carry out no more than three specific or limited-purpose business ventures for joint profit over a two-year period



ABOUT JOINT VENTURES

- ❖ **Main Characteristics:**
 - Co-management*
 - Sharing profits and losses
 - Limited duration
- ❖ **Competing as a Joint Venture:**
 - Joint Ventures should be formed before submitting offer
 - Agreement should provide for contract performance
 - FAR requires disclosure in the proposal
- ❖ **Forms of Joint Venture:**
 - Partnership
 - Limited Liability Company
 - Corporation



ADVANTAGES OF JOINT VENTURES

- ❖ **The Government can look to the resources of two (or more) companies to perform the work**
- ❖ **A minority Joint Venture member can exert more control over contract performance to protect its interests than in a traditional prime-sub relationship**
- ❖ **The Joint Venture parties receive favorable partnership income tax treatment**
- ❖ **Participating in a Joint Venture may allow a company to avoid any perceived stigma associated with being a Subcontractor to its competitors**



DISADVANTAGES OF JOINT VENTURES

- ❖ **Lead Contractor gives up some control**
- ❖ **If the Joint Venture is a partnership, the participating Contractors are jointly and severally liable to third parties for the acts of their Joint Venture partners, including criminal acts**
- ❖ **The Government may view the Joint Venture as lacking a clear point of contact, thus raising concerns regarding control, authority, and accountability**



STRUCTURING A JOINT VENTURE

❖ **Form of Joint Venture**

- **Partnership**
 - Can be informal
 - Legal risk
- **Limited Liability Company**
 - Easy to form; limited liability for partners
 - Requires capitalization and operation as separate entity
- **Corporation (more formalities)**



JOINT VENTURES: 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?
- ❖ 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 small business as managing venturer
- ❖ Not less than 51% of net profits earned by Joint Venture will be distributed to the small business participant
- ❖ Responsibilities of the parties
- ❖ Parties must ensure performance of the 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



POPULATED JOINT VENTURE

❖ PROS:

- One seamless entity performs work
- Reduces possible confusion in evaluating proposal
- The Joint Venture subcontracts directly with Subcontractors

❖ CONS:

- The SBA's Joint Venture regulations are not consistent with populated Joint Venture structure
- If approval of Joint Venture Agreement is required, it may be delayed by proposed structure
- The minority Joint Venture partner (49%) may not be able to exercise control over workforce under PM-managed populated Joint Venture



UNPOPULATED JOINT VENTURE

❖ PROS:

- Each Joint Venturer performs work independently as Subcontractors to Joint Venture
- Easier to explain structure to the SBA for approval of Joint Venture Agreement, if necessary
- Joint Venture may charge handling fee at prime contract level for work subcontracted

❖ CONS:

- May increase price if each Joint Venturer uses a subcontractor which in turn subcontracts to the second-tier subcontractors
- Procuring Agency may not understand who is performing work



LIMITED LIABILITY COMPANY JOINT VENTURE

❖ PROS:

- Liability – Members not liable (beyond capital contributions) to third parties for actions of the LLC
- Taxes – May be treated as partnership (or like an S Corp)
- The SBA – Recognizes LLC as structure

❖ CONS:

- Liability – Individual members remain responsible to the Government for performance of contract under SBA regulations
- Documentation – Articles of Organization and Operating Agreement need to be drafted
- Past Performance – No past performance record of its own unless the solicitation allows members' past performance history to be considered



JOINT VENTURE PARTNERSHIP

❖ PROS:

- Taxes – Treated as a partnership (or like an S Corp)
- Simple to set up
- The SBA – Structure with which the SBA is most familiar, making the review process less time consuming

❖ CONS:

- Liability – Partners are jointly and severally liable on debts of the partnership
- Documentation – Joint Venture Agreement necessary for 8(a) purposes; serves as Partnership Agreement
- Past Performance – No past performance record of its own unless the solicitation allows members' past performance history to be considered



EXEMPTIONS FROM AFFILIATION

- ❖ May not be awarded more than **three contracts** over a **two-year** period without a finding of general affiliation
 - May ultimately be awarded more than three contracts
 - After second award but within a two-year period, submits offers for three procurements; may be awarded a contract in response to all three of those offers, giving the Joint Venture five total contracts
 - May be awarded a contract beyond the two-year period provided the offer occurred prior to two years from the date of the first contract award
- ❖ Same two entities may form additional Joint Ventures and each may be awarded three contracts over two years, but at some point an affiliation may arise



EXEMPTIONS FROM AFFILIATION: SB JVs

- ❖ 2 or more small businesses may submit an offer as a small business joint venture if each is small under the NAICS code assigned to the contract, and:
 - The procurement qualifies as a “bundled” requirement; or
 - The procurement is not “bundled,” and:
 - Revenue-based size standard – Contract must exceed one-half of the size standard
 - Employee-based size standard – Contract must exceed \$10 million



EXEMPTIONS FROM AFFILIATION: 8(A) JVs

- ❖ A 8(a) firm and one or more other small businesses may submit an offer as an 8(a) joint venture if each is small under the NAICS code assigned to the contract, and:
 - At least one 8(a) firm is less than $\frac{1}{2}$ the size standard; and
 - Revenue-based size standard – Contract must exceed one-half of the size standard
 - Employee-based size standard – Contract must exceed \$10 million

- ❖ SBA-approved 8(a) Mentor-Protégé
 - Mentor-Protégé programs coming soon for all small business programs



JOINT VENTURES: 8(A) SET-ASIDES

- ❖ The Government can award 8(a) contracts to Joint Venture if:
 - One firm is 8(a) certified
 - All partners are SBs, unless in Mentor-Protégé

- ❖ The SBA must approve the Joint Venture Agreement
 - 8(a) firm must manage the Joint Venture and the project
 - 8(a) must furnish project manager
 - 8(a) must benefit from Joint Venture, but also bring something to the Joint Venture
 - 8(a) must perform at least 40% of the work done by the Joint Venture



JOINT VENTURES: SDVOSB

- ❖ SDVOSB must be managing venturer
- ❖ Employee of SDVOSB must be project manager
- ❖ SDVOSB must get 51% of net profits
- ❖ Joint Venture Agreement must set forth responsibilities with respect to performance
- ❖ SDVOSB firms can form separate entities under 13 C.F.R. § 121.103(h). Construction Engineering Services, LLC, SBA No. VET-213 (2011)
- ❖ SDVOSB Subcontractors may be used to meet limitations on subcontracting (performance requirements)
- ❖ Joint Ventures for VA contracts must be pre-approved



JOINT VENTURES: HUBZONE CONTRACTS

- ❖ All partners must be HUBZone
- ❖ All partners must be small
- ❖ The contract must meet certain size requirements
 - Revenue-based size standard – Contract must exceed one-half of the size standard
 - Employee-based size standard – Contract must exceed \$10 million
- ❖ If contract does not meet size requirements, Joint Venture may still qualify as long as the two firms, combined, are small



TEAMING AGREEMENTS VS. JOINT VENTURES

- ❖ **Liability**
 - Joint Venture 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 Joint Venture partners
 - Prime has control over teaming relationship
- ❖ **Bonding**
 - Joint Ventures 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



CHANGES COMING TO PERFORMANCE OF WORK CALCULATIONS

- ❖ 2013 NDAA
- ❖ Two substantive changes to the law governing limitations on subcontracting – Section 1651 of Public Law (no proposed rule yet):
 - New limitations for service contracts are now based on the total amount paid to the small business, not the cost of the contract incurred for personnel.
 - May meet performance requirements by subcontracting to other “similarly situated” small businesses.



TOTAL AMOUNT OF THE COST OF THE CONTRACT

- ❖ Prime contractors may not spend more than 50% of total amount paid to the concern under the contract on subcontractors.
- ❖ No longer able to exclude the cost of materials, supplies, and other non-labor costs from subcontracting limit calculation.



“SIMILARLY SITUATED” SMALL BUSINESSES

- ❖ Small business prime contractors may now meet their performance requirements by subcontracting to other “similarly situated” small businesses. (Those small under the same standard or participating in the same small business program.)
 - Prime contractors must be careful to make sure they count only those subcontractors who are participating in the same program, or who are also small for straight forward small business set-asides.
 - The new law does not allow for all small business subcontractors to fall within the exception.



ANY QUESTIONS?

If you would like to speak with Katie about teaming, subcontracting, or joint venture issues, please contact her as follows:

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