

HOW TO FORM TEAMING AGREEMENTS AND STRATEGIC PARTNERSHIPS

PRINCE GEORGE'S COUNTY ECONOMIC DEVELOPMENT CORPORATION
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OVERVIEW

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



WHY COMPANIES TEAM

- ❖ **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?



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



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.

ANY QUESTIONS?

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