



Capture Planning and Go To Market Strategies: Teaming, Subcontracting, Joint Ventures, and the Mentor/Protégé Program

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Our Speakers



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Overview

- Teaming Agreements
 - Key Considerations
 - Risks
- Subcontracts
 - Limitations on Subcontracting and Compliance concerns
 - Risks and Treatment for key RFPs
- Joint Ventures
 - Limitations on Subcontracting and Compliance
 - Treatment with Key RFPs
- Mentor/Protégé
 - New rules from SBA and the impacts

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TEAMING

Why Team?

❖ For Primes

- Enhances competitive posture
- Shares 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 subcontract

Teaming Steps



- ❖ Make sure you have the NDA signed prior to sharing information
 - ❖ Even the name of the procurement can be sensitive!
 - ❖ I have seen parties “steal” work by learning of a new procurement before it hit the street, gaining intel on it, then forming their own team. Without an NDA you are not protected
- ❖ If you already know the party don't take that for granted

Evaluating Team Members

- ❖ Public data
- ❖ Share CPARS
 - ❖ Critical, especially if you plan to submit subcontractor past performance references
- ❖ Ask for references
- ❖ Social media/networking

Teaming Agreement Benefits (for a Prime)

- ❖ A Teaming Agreement helps to clarify the expected work and makes it easier for the parties to understand the expectations of both sides before spending the resources necessary to create a proposal or before work begins
- ❖ The negotiations of a Teaming Agreement can show how the subcontractor will react and how difficult they will be to work with and/or control the actions of during performance

Teaming Agreement Benefits (for a Prime)

- ❖ A Teaming Agreement is generally an unenforceable “agreement to agree” as to the promise to issue a Subcontract
 - ❖ Language like “the parties will work in good faith to negotiate a Subcontract” are exactly the type of language a Prime wants
- ❖ A Teaming Agreement is enforceable as to the promise not to compete or to be exclusive
 - ❖ This means a Prime can refuse to issue the subcontract yet keep the team member exclusive and unable to bid with other teams
 - ❖ BUT...fraud can still apply. If the Prime knows they are going to do this and the Subcontractor can present evidence of the fact then the Prime can still be held accountable and face serious penalties

Teaming Agreement Risks (for a Sub)

- ❖ A Teaming Agreement is unenforceable as to the promise to provide a subcontract!
- ❖ This is what most subcontractors think the TA is for, to ensure they get their piece of the pie and many do not realize how legally worthless it can be...has practical value though
- ❖ The GovCon world is really the only place that TAs are so common...in commercial industries they enter into real subcontracts and agreements that are enforceable because “bidding” on work is far less common and/or you have a solid team via other arrangements and the like.
- ❖ It is hard to make a TA enforceable. You would need to have as many specific terms as possible about the work to be done, pricing, and, ideally, attached the actual subcontract itself to the TA and make it automatically effective upon award to the Prime
 - ❖ You could also make the TA become the subcontract if no other document is agreed-up on but that is risky unless it is a very robust TA
 - ❖ You could also try and incorporate a term stating that the Prime “shall award the subcontract to team member with the following terms:” and then be very specific
 - ❖ None of these are guarantees of enforceability though

Ostensible Subcontractor

- ❖ The TA is the first line of defense against an Ostensible Subcontractor challenge as that is the only document between the parties that exists before the proposal is submitted. The Proposal is also key.
- ❖ Subcontractor performs “primary and vital requirements” of a contract or order or
- ❖ Prime Contractor is unusually reliant on Subcontractor
- ❖ All aspects of the relationship between the Prime and Subcontractor are considered, including, but not limited to:
 - Terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work),
 - Agreements between the Prime and Subcontractor (such as bonding assistance or the teaming agreement), and
 - Whether the Subcontractor is the incumbent contractor and is ineligible to submit a proposal.
- ❖ Rule does not apply to a “similarly situated entity”

SUBCONTRACTING

The Subcontract

- ❖ Subcontract Agreements – include:
 - Same provisions from teaming agreement
 - Additional performance details
- ❖ Scope of work – identity:
 - SOW sections applicable to contractor
 - SB, WOSB, SDVOSB, HUBZone and 8(a) firms should retain discretion over performance including at order level
- ❖ Flow down provisions
- ❖ Identify PM roles for agency relations
- ❖ No assignment/lower-tier subcontracting

The Subcontract

- ❖ Carefully define duration, options, modifications, extensions, and follow-on work
- ❖ Deliverables and timeframe – identify:
 - Deliverables
 - Delivery schedule to prime contractor, then Government
- ❖ Use the FAR termination clause?
 - There are many reasons not to use it depending on the circumstances
 - You may give more rights to the subcontractor than you want
- ❖ Choice of Law/Venue

The Subcontract

- ❖ Identify billing rates for sub personnel
- ❖ Primes should have rights to review sub employees and replace unqualified individuals
- ❖ Primes should have rights to inspect and reject non-conforming goods and services
- ❖ Government has right to inspect sub's work/facilities

The Subcontract

- ❖ Clearly define when payment is due
- ❖ Define invoice procedure
- ❖ Limit travel and include the applicable per diem
- ❖ Right of audit
- ❖ Specify procedure in case Government disallows sub's costs
- ❖ Escrow accounts?
 - Need to have an assignment of claims with a bona fide financial institution, cannot be ad hoc

The Subcontract

❖ Disputes Between the Parties

❖ Do you want strict limitations on liability?

- ❖ The party in the wrong certainly does

❖ Do you want the indemnifications to be mutual?

- ❖ Primes often try to demand one sided indemnification (they are more at risk)

❖ Jury trial limitations?

❖ Disputes with the Government

❖ Make sure you have one clause for disputes between the parties and third parties and a separate clause or separate section of a clause to deal with disputes with the Government

❖ Make sure the clause requires the Prime to sponsor any claim even if they do not wish to pursue it

- ❖ Otherwise you may be left without any remedy! You cannot go after the Government yourself as you have no privity as a subcontractor
- ❖ Usually the subcontractor has to pay its own way but can use its own counsel
- ❖ If mixed with Prime Contractor claims, be sure to negotiate terms for who pays for what, involvement of each party's counsel, and responsibility for costs

Small Business Subcontracting Compliance

- ❖ Every prime contractor on a set-aside prime contract is subject to subcontracting limits:
 - 50% for services (not including ODCs where there is no small business capable of providing them) – 50% self performance requirement
 - 50% for supplies (not including materials) – 50% self performance requirement
 - 75% for specialty trade construction – 25% self performance requirement
 - 85% for general construction – 15% self performance requirement
- ❖ Prime contractor cannot pay out more than the specified percentage to a non-similarly situated subcontractor
 - ❖ Whether a subcontractor qualifies as “similarly situated” depends on the type of set-aside
 - ❖ Whether the “similarly situated” subcontract is small though is determined based upon the NAICS code for the subcontract – DOES NOT have to match the Prime NAICS

Protecting Intellectual Property

- ❖ Subcontractors should avoid “work for hire” language in a subcontract
- ❖ Clearly indicate any pre-conceived IP being used or brought into the relationship
- ❖ Audit rights and ownership of all IP you currently have and carefully follow the applicable FAR/DFARS provisions
 - ❖ Only use the FAR/DFARS legends for non-commercial IP
 - ❖ For Commercial IP always use a license agreement and have the license as an attachment to the subcontract
- ❖ If you are the Prime, make sure you have all rights necessary to perform the work and provide the IP to the Government with the rights required in the Contract
 - ❖ If you do not have the requisite rights you are in default and may have to indemnify the Government for any losses

JOINT VENTURES

What is a Joint Venture?

- ❖ In general: a limited purpose entity
- ❖ SBA's definition: "A joint venture is an association of individuals and/or concerns with interests in any degree or proportion 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." 13 C.F.R. § 121.103(h).
- ❖ NOT a CTA
- ❖ Does NOT have to be just between a mentor and protégé

Why Joint Venture?

- ❖ The Government can look to the resources of two (or more) companies to perform the work
 - New rule that Government must take into consideration past performance of all joint venturers on set-aside contracts
- ❖ A minority joint venture member can exert more control over contract performance to protect its interests than in a traditional prime/sub relationship
- ❖ May allow the minority joint venture member to participate in a set-aside contract that it might not otherwise be eligible for
- ❖ Attribute only the revenues to each company for the work that it performs for the joint venture, not all the revenues like a prime/sub relationship

Small Business Joint Venture Compliance

- ❖ All members must be small businesses under the NAICS size standard applicable to the procurement...UNLESS...the JV is with a large firm SBA or DOD approved Mentor.
- ❖ The majority owner(s) must qualify for the type of set-aside you are going after
- ❖ JVs must be unpopulated
 - ❖ But can have administrative personnel (Helps with FCLs)
- ❖ JVs are qualified for two years after the first award to the JV
 - ❖ Novations are considered awards
 - ❖ No limitation on the number of contracts that can be awarded to a JV during the two-year period

Small Business Joint Venture Compliance

- ❖ “External” Performance of Work: The JV must perform at least 15/25/50% of the work on the Contract, the other percentage can be subcontracted to any firm
 - ❖ Calculation is all JV members combined
- ❖ “Internal” Performance of Work: The qualified members of the JV must perform 40% of the work performed by the JV
 - ❖ Cannot be met by subcontractors, even if similarly situated to the qualifying member
 - ❖ The “Internal” and “External” performance of work is determined period-by-period, not the full life of a contract
 - ❖ For IDIQ contracts it is across all task orders per period of performance...UNLESS...the KO states that it will be measured order-by-order
- ❖ JV work is calculated by adding work from all JV members combined, including work done by affiliates of JV members

Small Business Joint Venture Compliance

- ❖ SBA is now comparing the JV Agreement to the proposal during size protests, if they don't match the JV may be rejected
- ❖ All elements of the applicable JV regulations must be included in the JV Agreement for a JV to be compliant (generally 13 CFR 125.8)
- ❖ The JV Agreement must be finalized and signed prior to the submission of the proposal.
- ❖ SBA is cracking down on JVs and the SBA's Office of Hearings and Appeals recently ruled that the qualifying member must have control over if and when the JV submits and proposal, among other issues...make sure you check all possible negative control questions
 - ❖ These are not all found in the regulations
 - ❖ This is a problem for large primes and Mentors who want to be able to control various functions, especially bidding
- ❖ If you do not meet every requirement you will losing the contract if protested
- ❖ Joint Venture must be registered in SAM as a joint venture
- ❖ The SBA does not approve the Joint Venture Agreement for any type except for sole source 8(a) awards (new rule)

Joint Venture Issues

- ❖ Revenues for Size Purposes from a JV are split amongst the members commensurate with:
 - ❖ Work performed – for Revenue Based NAICS Codes
 - ❖ Ownership – For Employee Based NAICS Codes
 - ❖ So you never take on 100% like you do in a Prime/Sub situation)
- ❖ Profits split the same way...BUT...usually JVs have \$0 profits so this regulation is largely irrelevant
- ❖ Construction JVs may not make sense!
 - ❖ In a Prime/Sub relationship the subcontractor can perform 85% of the work
 - ❖ BUT...as JV member the Mentor other company companies are still subject to the “Internal” Performance of work rules so they can do LESS work in a JV than they could a subcontractor

Joint Venture Issues

- ❖ Many new RFPs (STARS III, CIO-SP4) allow the JV to take advantage of all members experience, past performance, and other qualifications
 - ❖ However, performance of work calculations can be very difficult – With large IDIQs each member brings different skills...so what happens if all the work you win goes to the non-qualified member?
 - ❖ If you knew or should have known that would happen there can be FCA implications...try to comply as closely as you can...DOJ loves to use performance of work in FCA investigations
- ❖ Ways to get creative?
 - ❖ Can you “nest” a JV in side of another JV?
 - ❖ Can you form a JV with a large Mentor and multiple Protégés?
 - ❖ Can you form a JV with a large Mentor, its Protégé, AND another small business?

GSA “CTAs”

GSA Contractor Teaming Arrangements

- ❖ Entirely different from FAR 9.601 Contractor Teaming Arrangements
 - ❖ The FAR allows for ONLY two types of teaming
 - ❖ A Joint Venture
 - ❖ A Prime/Sub Relationship
- ❖ GSA cooped the term and now contractors view “CTAs” as something contrary to the FAR – causes much confusion
- ❖ GSA’s guidance as to the use of CTAs is that all members are considered “Co-Primes” not subcontractors or JV members

GSA Contractor Teaming Arrangements

- ❖ There are no laws or regulations specifying the rules for GSA CTAs
- ❖ For this reason, SBA refuses to acknowledge them in its regulations, as such, the performance of work rules and how they are treated for small business purposes is unclear
 - ❖ Performance of work rules?
 - ❖ Can you form a CTA with a large business for a set-aside?
 - ❖ How are the revenues calculated for size purposes of the CTA members?

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MENTOR / PROTÉGÉ

Mentor Protégé Program

- ❖ For size purposes SBA only recognizes approved Mentor Protégé programs
 - ❖ SBA merged the 8(a) and All Small Mentor Protégé Programs
 - ❖ DOD MP Program is statutory so that does not require approval
 - ❖ Agency MP Programs are still a gray area – SBA claims it must approve them to shield members from affiliation
- ❖ You can no longer seek reconsideration for the denial of MP application

Protégé Requirements

- ❖ Must be small under the Primary NAICS code
- ❖ Or... if seeking approval under a Secondary NAICS code
 - ❖ Protégé must demonstrate prior work in one or more similar NAICS code or
 - ❖ Where the NAICS code is a logical business progression from work previously performed
 - ❖ Protégé does not have to be small under its primary NAICS code
- ❖ Generally one Mentor at a time but could have up to two
- ❖ A Protégé can only have two Mentors in its entire life
 - ❖ New SBA rule allows for annulment of a MPA if it ends within 18 months of approval.. .BUT
 - ❖ If there is a consistent pattern of early terminations SBA may refuse to approve additional MPAs

Mentor Requirements

- ❖ Can be small or large
- ❖ Can be a Mentor and a Protégé at the same time
- ❖ Must show commitment and capability of providing the mentoring
- ❖ Must possess good character (not suspension or debarment)
- ❖ Non-Profits are not eligible
- ❖ May have up to three protégés at any one time but there cannot be any adverse impacts on the protégés and you must be capable of supporting the assistance
- ❖ No limit on the number of protégés over the Mentor's lifetime

Mentor Protégé Term Length

- ❖ Maximum term is six years in one MP relationship
 - ❖ Two three-year terms
- ❖ Either party can terminate the relationship with 30 days notice
- ❖ The relationship cannot continue without the agreement of both parties

Mentor Protégé Compliance

- ❖ Protégés must provide an “honest assessment” of the Mentor each year
- ❖ Protégés can request SBA’s intervention if the Mentor is underperforming
 - ❖ SBA can replace the Mentor if it does not correct any deficiencies to SBA’s satisfaction (Protégé’s view is critical)