

Government Teaming Relationships

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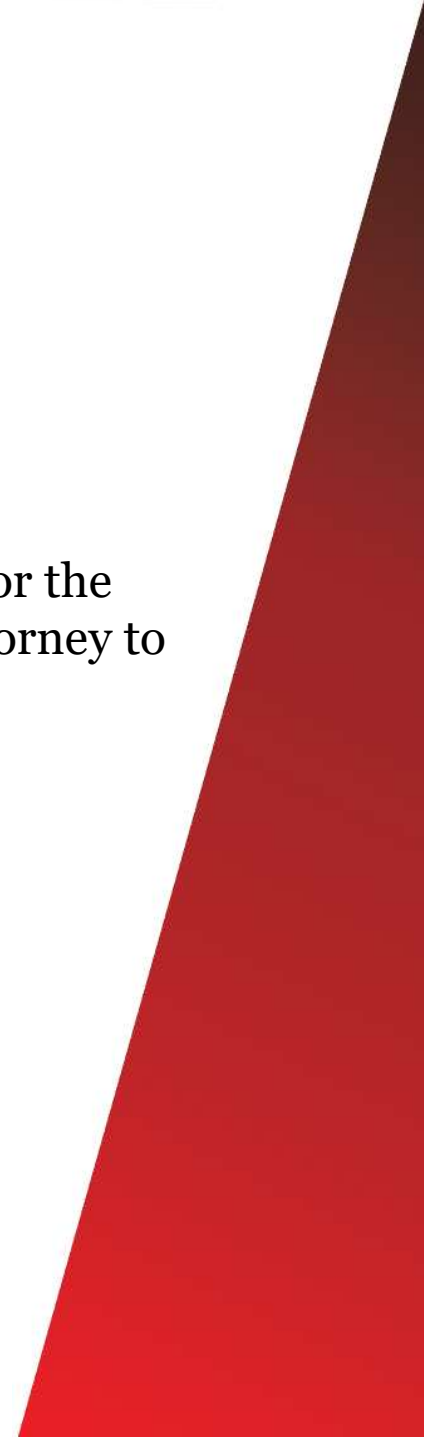
Procurement Technical Assistance Center

September 9, 2021



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Agenda

- **Why Team**
- **Selecting your Partner**
- **Types of Teams**
 - **Teaming Agreements/Subcontract**
 - **Contractor Teaming Arrangements (CTAs)**
 - **Joint Ventures**
- **Other aspects of Teaming: Pitfalls to avoid**
- **Best practices**



Why Team?

- Leverage capabilities/enhance competitive posture
- Reduce risk
- Facilitate market entry
- Address experience or past performance
- Opportunities to bid on set aside contracts (large businesses)



Why Team – Small Business

- Small businesses are in growth mode, but may need help:
 - May need guidance/mentoring to grow the business:
 - Developing internal systems for business management, accounting, marketing, manufacturing, resource deployment, and strategic planning
 - May need access to capital/bonding/staffing resources
 - May need a navigator to explain working with the government, including
 - Understanding the compliance requirements
 - Introductions to government customers to explain capabilities
 - Direction on how to develop business and bid on solicitations

Why Team – Large Business

- Other-than-small businesses are not eligible for set-aside procurements.
 - Teaming is a way to partner with a small business that is eligible for the set-aside procurements and perform a portion of the work on the set-aside contract.
 - Teaming allows the parties to develop relationships that may extend beyond this one contract opportunity/series.
 - May develop new subcontractor and supplier relationships

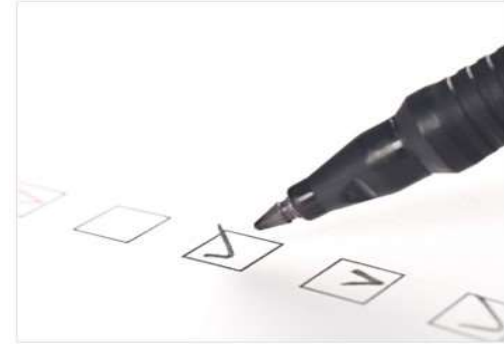
Selecting your Team

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With Whom Should you Consider Teaming?

- Factors to consider:
 - Data confidentiality/security
 - Companies collaborative capabilities
 - Financial compatibility
 - Proposal development capabilities
 - Competition on previous bids
 - Future Competition from potential teammate
 - Compatibility of corporate managements
 - Prior experience and reputation
 - Actual or potential organizational conflicts of interest
 - Affiliation/size status
 - And TRUST



Are your business personalities' compatible?

- This is the DATING PHASE:
- Business Personalities:
 - Does your business' approach and culture fit with the partner you are considering?
 - Are your management and leadership styles compatible?
 - Is the leadership on the other side trustworthy?
 - Or do you have concerns that will change.
 - Do you feel bullied, tricked, or trapped?
 - RUN AWAY!
 - Are you seeing any red flags?
 - Ask to attend meetings with the other business
 - See how they interact with government customers

What Due Diligence should you Conduct?

- At a minimum, check the SAM registration: www.sam.gov
 - AND, review it carefully.
 - Even if you don't know what it all means, read for red flags.
- Check the suspended and debarred list.
 - If you are thinking about non-federal state or local work as well, check with those states.
- Do a “Google” search
 - This will show you the public information
- If you suspect this is a partner that has litigation in court – look up the public dockets.
- ASK them.

Types of Teams

What Form Should We Choose?

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FAR 9.601

- Two different types, defined at FAR 9.601:
 - *Contractor team arrangement*, as used in this subpart, means an arrangement in which-
 - (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
 - (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.
- FAR 9.603: The USG policy to recognize arrangements provided that company relationships are fully disclosed in an offer or before the relationship becomes effective.

Teaming Agreements

- **Teaming Agreements/Subcontract: FAR 9.601(2)**
 - This is the ENGAGEMENT Phase
- TRADITIONAL Prime-Subcontractor relationship
 - Only one party is the prime
 - Must identify in proposal/bid
 - Parties enter into a Teaming Agreement
 - often contains recommended provisions for the resulting subcontract
 - Once the prime contract is awarded, then parties enter into a subcontract or subcontract negotiations. The subcontract replaces the teaming agreement; it is the marriage stage.
 - Issues:
 - Enforceability issues?
 - Agreement to Agree
 - For One Specific Contract/Project or a for a Type of Project over a period of Time
 - Subcontracting limitation rules applies to prime
 - Consider ostensible subcontractor affiliation
- Least formal arrangement

Teaming Agreements and Subcontracts – Pros and Cons

- **PROS**

- Less expensive and cumbersome to set up

- **CONS**

- Need to craft a teaming agreement that is concise otherwise will have issues
- Potential for conflict between terms of the teaming agreement and the subcontract
- Hard to resolve disputes
- Difficulty in enforcement
- Must comply with Limitation on Subcontracting Rule



Contractor Teaming Arrangement

- This is more like the MARRIAGE Phase
- **FAR 9.601(1)** Horizontal Teaming relationship
- All parties have privity of contract with Government.
 - Two or more parties
 - Team because each only has certain capabilities or resources
 - Together provides more robust solution for USG.
- Most commonly seen in General Services Administration (GSA)

Contractor Teaming Arrangement

- **GSA CTAs:**
- GSA allows CTAs when one business alone cannot offer total solutions, but if teamed together with another(s) can.
 - Both partners must have a GSA Schedule
 - Each member of a CTA is in direct privity of contract with the USG and may interact directly
 - Are directly responsible for performance, even if it was the other parties' assignment.
 - Buying agency invoices at the performing team member's unit prices/hourly rates as agreed in the task order/delivery order or the blanket purchase agreement.
- Parties execute a Contractor Teaming Arrangement Agreement (CTAA)
- All team members must meet the socioeconomic status for the set-aside and the limitations on subcontracting.

Contractor Teaming Arrangements – Pros and Cons

- **PROS**

- Parties are more equal
- Both have own Schedules/Contracts with GSA and USG
- Opportunity to gain experience in new area/capability
- Develop strong partnership relationships

- **CONS**

- Responsible for performance of other party(s)
- Have to ensure GSA Schedules are renewed



Joint Venture Agreements

- This is also the MARRIAGE Phase
- **Under Teaming Agreements, parties may elect to form Joint Ventures**
 - SBA Regulations: 13 CFR § 121.103(h)
 - A joint venture is an association of individuals and/or concerns with interests in any degree or proportion intending to engage in and carry out 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....
 - Short-lived: 2 years from the time of the first award.
 - Replaces the 3-in-2 Rule, which previously limited the time and number of contracts
 - More formal
 - Must be in writing
 - Do business under its own name
 - Be identified as a JV in SAM.gov
 - May be “any combination of individuals, partnerships, or corporations.” (FAR 4.102)
 - May form a form new entity (LLC, Inc.) or may operate as informal partnership
 - Legal choice
 - If a formal entity, may not be populated, except for admin personnel

Joint Venture Agreements

- Benefits/Detriments:
 - Joint Venture is the prime contractor; both businesses are part of the JV
 - Permits profit sharing
 - Regulations regarding joint venture provisions
 - Subcontracting limitations (discussed below)
 - Affiliation (discussed below)
- Small Business Joint Ventures
 - All members must be small and
 - Have the same socioeconomic status as the procurement
 - May form a Mentor-Protégé JV

Small Business Mentor-Protégé JV

- **May form a Mentor-Protégé Joint Venture**
 - Allows for large businesses to team with small businesses without automatically triggering affiliation
 - First the businesses have to be in an approved Mentor-Protégé relationship.
 - Large Business = Mentor;
 - Small Business = Protégé
- **The Mentor-Protégé Program**
 - SBA consolidated the “All Small Business Mentor-Protégé Program” (“All Small”) and “8(a) Competitive Mentor-Protégé Program” into one program, now identified as the “SBA Mentor-Protégé” (Nov. 2020).
 - Only Sole Source 8(a) set-asides require SBA review and approval.

Small Mentor-Protégé Program

- All businesses considered small under their primary NAICS code may now participate in the SBA MPP (13 CFR 125.9)
 - Protégé qualifications:
 - Small business under primary NAICS code or relevant secondary code
 - For profit
 - A significant U.S. connection (place of business, operations, contributions)
 - Have a proposed mentor
 - Mentor Qualifications:
 - Organized for profit
 - Possess good character
 - Not be suspended or debarred
 - Add value and practical experience through general business and USG contracting experience.
 - Penalties (up to debarment) for failure to comply with the terms of the mentor-protégé agreement

Small Business Mentor-Protégé JV

- **ANY** small business can form a joint venture with any mentor business that demonstrates a commitment and ability to assist small businesses.
 - Prior to 2016, only 8(a) companies were eligible.
 - Max of 2 **Lifetime** Mentors
- Protégé is the lead and must manage the contract,
 - furnish the project manager,
 - own at least 51% of the JV,
 - perform at least 40% of the work performed by the JV,
 - receive profits commensurate with work performed (or as agreed to by the parties such that the small business receives more).

Small Mentor-Protégé Program

- The small business self-certifies as small
 - Socioeconomic Statuses require review
- If seeking mentor-protégé relationship under secondary NAICS code, the small business must demonstrate how the mentor-protégé relationship is a logical business progression that will develop and expand their current capabilities
- SBA must approve the Mentor-Protégé Agreement (MPA), in which both mentors and protégés pledge commitment to the partnership.
 - Required contents are listed at 13 CFR 124.520
- A second mentor-protégé relationship requires special approval

Forming Small Mentor-Protégé JV

- After forming a Mentor-Protégé, partners can then form a joint venture
 - SBA Regulations apply to the Joint Venture Agreement:
 - 13 CFR § 124.513 for 8(a)
 - 13 CFR § 125.8 for all other Small Business Concerns
 - The SBA does not review the JVA unless it is for Sole Source 8(a) set-aside contracts, which must be approved *prior* to contract award
 - Take credit for both parties past performance, experience, and capabilities
- 13 CFR 125.6 *limitations on subcontracting* apply
- 13 CFR § 125.8(c) - *Performance of Work*: Protégés must perform at least 40% of the substantive work when participating in a JV
 - This means Mentors may perform up to 60%, which is a larger workshare than normal

Non-Mentor-Protégé 8(a) Joint Venture Rules

- Still permissible, but not as common
 - 8(a) is a short term program
- An 8(a) may enter into a Joint Venture Agreement with:
 - Another small business concern
- 8(a) Set Asides - Joint venture agreement must be approved by SBA prior to award
 - A separate addendum to the JV agreement must be approved by the SBA for any additional contract the JV will receive
- For non-MPP JVs, only one of the joint venture partners must be 8(a) certified, but all must be small
- Permissible only where 8(a) concern lacks necessary capacity to perform on its own and agreement is fair and equitable and will be of substantial benefit to the 8(a)

Non-Mentor-Protégé 8(a) Joint Venture Rules (cont'd)

- The 8(a) partner must
 - manage the contract
 - furnish the project manager
 - own at least 51% of the JV
 - perform at least 40% of the work performed by the JV
 - and receive profits commensurate with the work performed

- Very specific provisions required in JV agreement (see 13 CFR §124.513(c)(1)-(12))

- JVs that are a separate legal entity may only have administrative personnel

Joint Venture Agreements – Pros and Cons

- **PROS**

- Co-management
- Sharing of profits
- Equal partners – not a tiered relationship
- Favorable tax treatment (partnerships)



- **CONS**

- Agreement generally must be formed before bidding on contract (although doesn't need to be registered as an "Inc." or an "LLC" until notice of award)
- Co-management problems
- Sharing of losses
- Legal problems – jointly and severally liable for acts of joint venture partners, including criminal acts

Mentor-Protégé Joint Venture Agreement

- **PROS**

- Allows large businesses to participate in small business set-asides without a finding of affiliation
- Helps small businesses win larger projects
- Large businesses have access to larger % of work on set-asides

- **CONS**

- Additional regulations and more scrutiny
- Non-compliance of the Mentor (as determined by the SBA) may be grounds for suspension/debarment

What should you consider?

- What is the difference between CTA and JVs?
 - Vertical Teaming
 - Horizontal Teaming
- Think about the relationship to the Government that you want to have
- Whether you want Prime Contract responsibilities
- Whether you want a separate legal entity
- If there are Small Business status considerations.

Other aspects of teaming

Pitfalls to avoid, or at least be aware of

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Limitations on Subcontracting (FAR 52.219-14; 13 CFR 125.6)

- Every set-aside contract contains some kind of subcontracting limit
 - Depends on type of contract
 - Small business set-asides are exempt if value between \$10,000 and \$250,000
 - All others still subject to limitations on subcontracting even below \$250,000 [8(a), HUBZone, SDVOSB, and WOSB]
- FAR and SBA *used to have* different focuses:
 - FAR focus: cost of performance
 - SBA focus: amount govt. paid

Limitations on Subcontracting (52.219-14; 13 CFR 125.6)

- Small Business Must Satisfy the Following Percentages By Own Efforts and Those of “Similarly Situated” Subcontractors When Subcontracting:
 - Services (non-construction – Prime will not pay more than 50% of the amount paid by the government to subcontractors that are not similarly situated.
 - Supplies or products – Prime will not pay more than 50%, excluding the cost of materials of the amount paid by the government to subcontractors that are not similarly situated.
 - General construction – Prime will not pay more than 85%, excluding the cost of materials of the amount paid by the government to subcontractors that are not similarly situated.
 - Construction by special trade contractors – Prime will not pay more than 75%, excluding the cost of materials of the amount paid by the government to subcontractors that are not similarly situated.
- Mixed contract? Look at NAICS code!

Similarly Situated Entities

- Effective September 10, 2021, the FAR will now reflect similarly situated. (FAR 19.001 and FAR 52.219-14)
- In 2016, the SBA issued a final rule flowing from 2013 NDAA
 - Provision of 2013 NDAA allows contractors to count “similarly situated” contractors in determining compliance with the limitation on subcontracting rule.
 - Meaning first tier-subcontractors who are similarly situated may count toward the 50% of the cost of contract performance calculation.

Similarly Situated Entities

- Who is similarly situated?
 - “a subcontractor that has the same small business program status as the prime contractor”
 - In other words, similarly situated subcontractors must be (1) small under the NAICS code assigned to the procurement and (2) in the same program status (i.e., HUBZone, WOSB, SDVOSB, 8(a)) as the prime contractor
 - The “similarly situated” subcontractor need only be small under the NAICS code assigned by the prime – NOT the primary NAICS code for the contract.
- Only the first-tier subcontractors may be counted as “similarly situated” – ANY work subcontracted beyond the first-tier does not count, even if it would otherwise qualify as “similarly situated”
 - Note: this should not be confused with the rules for Small Business Subcontracting Plans under FAR 19.702, which effective Jan. 23, 2017 allow primes to receive credit for subcontractors in various preference programs at any tier

Similarly Situated Entities

- Note: this should not be confused with the rules for Small Business Subcontracting Plans under FAR 19.702, which effective Jan. 23, 2017 allow primes to receive credit for subcontractors in various preference programs at any tier.
- Be careful – penalties could be harsh
 - Suspension, debarment, administrative remedies, fines, and even imprisonment
 - The 2013 NDAA mandated that fines must be the greater of either \$500,000 or the dollar amount spent in excess of the permitted levels for subcontracting

Affiliation

- Effect of a finding of affiliation: add the sizes of the prime and subcontractor together for size eligibility purposes
- Numerous ways entities can be found affiliated (e.g., ownership, identity of interest, common management, etc...)
 - “totality of the circumstances”
- Ostensible Subcontractor Rule:
 - SBA may find a small prime affiliated with its subcontractor if:
 - The subcontractor performs the “primary and vital” parts of the contract and/or;
 - The prime contractor is unusually reliant upon the subcontractor



Joint Ventures and Affiliation

- Joint ventures can give rise to a finding of affiliation
 - Joint ventures are short term, and may not be awarded over more than a two-year period, starting from the date of the award of the first contract
 - 13 CFR 121.103(h)
 - “Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award. An individual joint venture may be awarded one or more contracts after that two-year period as long as it submitted an offer including price prior to the end of that two-year period
 - If you have two contracts, submit a number of proposals, and happen to win several of them, then you are still in compliance
 - Can have multiple joint ventures, but eventually may lead to a finding of affiliation

Joint Ventures and Affiliation

- SBA Regulations create an exception to the affiliation rules for certain joint ventures
 - 1) Both concerns are small under the NAICS code assigned to the contract
 - 2) Parties are in an SBA-approved Mentor-Protégé Agreement. This is how large businesses can participate in set-aside procurements.

Small Business Size Calculations

Small Business Runway Extension Act of 2018

- SBA designates size standards for industries under the North American Industry Classification System (NAICS) based upon two methods:
 - a firm's number of employees over the past twelve months (usually for manufacturing), or
 - a firm's average annual revenue over a specified period (usually for service-based work).
- This Act, signed into law by President Trump on 17 December 2018, changes calculation period for *revenue*-based small business size standards.

Small Business Size Calculations

Small Business Runway Extension Act of 2018

- FINAL RULE went into effect on January 6, 2020:
 - Until January 6, 2022, contractors with revenue-based size status calculations may select either a 3-year or a 5-year annual receipts look-back period.
 - After January 6, 2022, all contractors with revenue-based size status calculations MUST select the 5-year period.

Best Practices

A quick conversation about what we've seen go wrong.

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Best Practices

- Get to know your partner first! (Date them!)
- Ask questions – if you have a nagging feeling, don't ignore it.
- Be honest about your company and your plans.
- The SBA is your best resource.

So, What Form Should We Choose?

- Teaming Agreements/Subcontract
- Contractor Teaming Arrangement Agreements
- Joint Ventures Involving a Mentor and Protégé
- Joint Ventures

It depends.

Questions

Connect with us!

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