



Business Teaming Arrangements in Federal Contracting

Ohio University PTAC

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Presentation Overview

JOINT VENTURES VS. PRIME/SUB TEAMS

- Similarities and Differences
- General Principles for Both

JOINT VENTURES

- Requirements
- Joint Venture Agreements
- Other Legal Matters

PRIME/SUB TEAMS

- Big Picture Principles
- Limitations on Subcontracting & Ostensible Subcontractor Affiliation
- Teaming Agreements & Subcontract Agreements

Presentation Overview

BEFORE WE GET STARTED . . .

- This presentation is for educational use only and is not individualized legal advice
- This presentation covers the rules in effect when the presentation was given—but check for updates in the future!

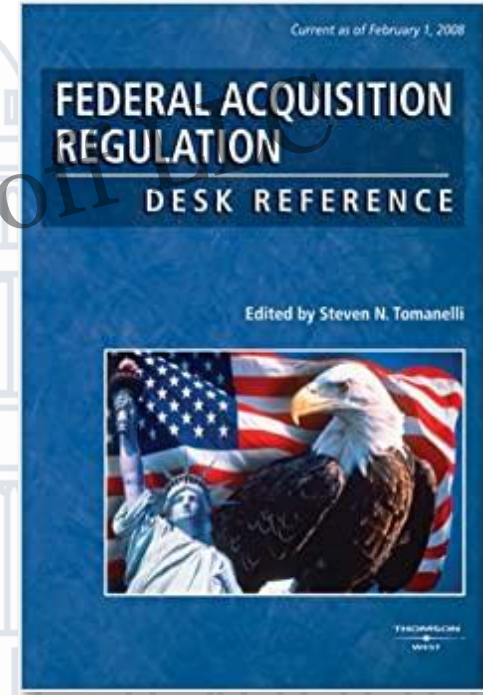
Joint Ventures vs. Teams

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Joint Ventures vs. Teams

FAR 9.601

- Government recognizes two types of Contractor Team Arrangements:
 - FAR 9.601(1): Partnership or joint venture
 - FAR 9.601(2): Prime/subcontractor



Joint Ventures vs. Teams



SBA REGULATIONS

- For small businesses and their teammates, many teaming rules are part of the SBA's regulations (13 C.F.R.), not the FAR (48 C.F.R.)
 - These are still valid and enforceable regulations!
 - SBA's rules consider a partnership to be a type of joint venture

Joint Ventures vs. Teams

JOINT VENTURES

- Both parties perform at the prime contract level and are responsible for the entire contract
- Parties typically split profits and losses
- Parties create a new legal entity (e.g., LLC) registered in SAM
- Subcontracting limits apply to JV as a whole

PRIME/SUB TEAMS

- Only one party (prime) performs at the prime contract level and is responsible to the government
- Subcontractor typically paid on a pre-determined basis
- No new legal entity created
- Subcontracting limits apply to prime only (but note similarly situated entity rule)

Joint Ventures v. Teams

EXAMPLE

SmallCo LLC and BigCorp Inc. form a new entity, BigSmall LLC. The new legal entity registers in SAM. It will submit a bid, in its own name, in response to a federal government solicitation.

Result: BigSmall LLC is a joint venture.

Joint Ventures v. Teams

EXAMPLE

QuickDri LLC intends to submit a bid on a government contract for dry cleaning services. QuickDri agrees to subcontract laundry pick up to Trucks R' Us, Inc.

Result: QuickDri and Trucks R' Us have established a prime/subcontractor team.

General Principles for Both

DO

- Use a specific agreement tailored to your individual situation
- Consult with professional resources as needed
- Take time to carefully read drafts and source documents
- Ensure compliance with applicable regulations
- Negotiate the best possible deal with your teammate



General Principles for Both

DON'T

- “Dust off” and use an unedited commercial contract
- Rely blindly on a teammate’s template or an internet template
- Be afraid to negotiate – even with a large business
- Rely on handshake or oral deals
- Assume your teammate has your best interests in mind
- Assume your teammate knows what the heck it is doing



General Principles for Both

SCARY EXAMPLE #1

QuickDri LLC and Trucks R' Us form a joint venture to pursue a SDVOSB set-aside contract. QuickDri, the SDVOSB, wants to save money, so it drafts the JV agreement itself based on an 8(a) template it found on an “archived” SBA website.

Result: The template is outdated—and for the wrong program. Although the JV is awarded the contract, the award is terminated following a competitor’s successful SDVOSB protest.

(Based on a real case)

General Principles for Both

SCARY EXAMPLE #2

QuickDri LLC intends to subcontract a portion of a set-aside contract to BigCorp., Inc. BigCorp sends QuickDri its “standard” teaming agreement. Written on BigCorp letterhead, the teaming agreement includes many provisions favorable to BigCorp, including the ability for BigCorp (but not QuickDri) to terminate the relationship without cause. Too scared to negotiate against a large prime, QuickDri signs the agreement as-is.

Result: After the team is awarded the contract, a competitor files a size protest. The SBA holds that the team is in violation of the ostensible subcontractor affiliation rule—based in part on the subcontractor-friendly provisions of BigCorp’s “standard” teaming agreement.

(Based on a real case)

Joint Ventures

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Joint Ventures – Initial Requirements

FORM AND REGISTRATION

- SBA regulations (13 C.F.R. § 121.103(h)) require that a JV:
 - Must be in writing
 - Typically, this is done by way of a joint venture agreement
 - Must register in SAM
 - This means the JV must have an EIN and DUNS
 - The JV must be identified in SAM as a joint venture



Joint Ventures – Initial Requirements

UNPOPULATED

- A joint venture formed as a separate legal entity (e.g., LLC) must be “unpopulated”
 - “[M]ay not be populated with individuals intended to perform contracts awarded to the joint venture”
 - However, the JV “may have its own separate employees to perform administrative functions,” including a Facility Security Officer

Joint Ventures – Initial Requirements

NUMBER OF VENTURERS

- Most “SBA-Rules” joint ventures consist of only two members
- However, except for mentor-protégé JVs (which can only consist of an SBA mentor and its protégé), there is no hard limit on the number of venturers
 - We have helped form JVs with 3-5 participants!

Joint Ventures – Initial Requirements

THE “TWO YEAR” RULE

- When a joint venture is awarded its first contract, a two-year window opens
 - During those two years, the JV may bid on an unlimited number of contracts and accept the awards resulting from those bids
 - Even if award date is after two-year window closes
 - SBA has eliminated three-contract limit (“three-in-two”)
 - Once two-year window closes, JV should stop bidding—or the JV members risk affiliation

Joint Ventures – Initial Requirements

THE “TWO-YEAR” RULE

- Rule is very easily circumvented: just form a new joint venture entity!
- Rule is specific to a joint venture entity, not the joint venture partners
 - *Size Appeal of Quality Services International, Inc.*, SBA No. SIZ-5599 (2014):
 - Over four-year period, partners formed 8 JVs and were awarded 15 contracts
 - No three-in-two violation because none of the JVs received more than three contracts over a two- year period
- SBA says that “at some point,” too much joint venturing could lead to affiliation, but provides no guidance

Joint Ventures – Size

SMALL BUSINESS REQUIREMENTS

- A joint venture qualifies as a small business so long as each member of the JV, individually, falls below the applicable size standard
 - Change from an old SBA rule, in which venturers' sizes were sometimes added together
- Only way to have a joint venture between large and small business is through mentor-protégé exception



Joint Ventures – Size

EXAMPLE

QuickDri LLC has \$5.0 million in average annual receipts. SlowDri LLC has \$4.0 million. The two form a joint venture, Quick-'n'Slow JV LLC. The JV will pursue a contract under NAICS code 812320, with a \$6.0 million size standard.

Result: The JV is eligible to be a small business because both JV members are under \$6.0 million.

Joint Ventures – Size

EXAMPLE

Buoyed by its first JV success, QuickDri LLC (\$5.0 million) forms a second joint venture, this one with Trucks 'R Us, which has \$25 million in average annual receipts. The JV will pursue a small business set-aside contract under NAICS code 812320, with a \$6.0 million size standard.

Result: Unless there is an active, approved SBA mentor-protégé agreement, the JV is ineligible because one member exceeds the applicable size standard.

Joint Ventures – Size

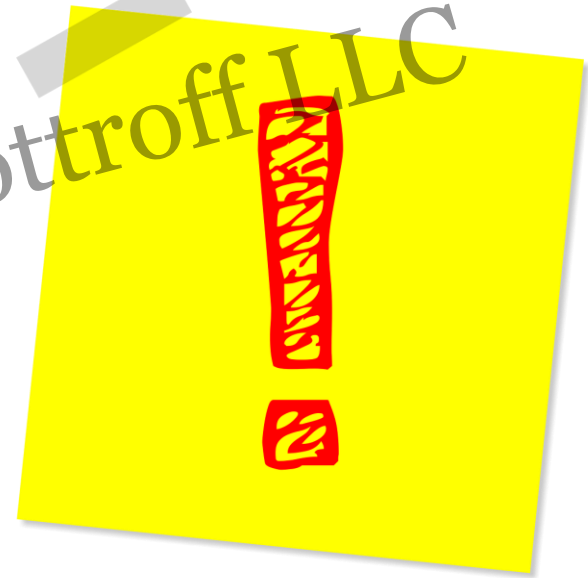
THE MENTOR-PROTÉGÉ EXCEPTION

- SBA-approved mentor and protégé may JV for any federal procurement for which the protégé qualifies as small
 - Regardless of mentor's size!
 - SBA must pre-approve JV agreement for 8(a) sole source contracts
 - JV agreement must meet requirements of applicable regulation (depends on solicitation's socioeconomic status—e.g., 8(a))
 - 8(a) and All Small Mentor-Protégé Programs have been consolidated

Joint Ventures – Size

THE MENTOR-PROTÉGÉ EXCEPTION

- Contrary to a popular misconception, a mentor-protégé agreement is not required if both parties are small!



Joint Ventures – Size

THE MENTOR-PROTÉGÉ JOINT VENTURE

- Contrary to another popular misconception, a mentor-protégé agreement does not establish contracting entity.
 - Not registered in SAM.
 - Can't bid as a mentor-protégé "team" without a joint venture agreement (or teaming/subcontract agreement).
 - Does require SBA's approval before joint ventures can be formed that qualify for mentor-protégé exception to size rules.
- Once SBA approves a mentor-protégé relationship, the parties execute separate joint venture agreements and bid as mentor-protégé joint venture team (under size exception).

Joint Ventures – Socioeconomic

STATUS OF LEAD MEMBER

- For a joint venture to pursue an 8(a), SDVOSB/VOSB, WOSB/EDWOSB, or HUBZone contract, the JV's lead member must hold the appropriate socioeconomic certification or self-certification
- If properly structured, the JV “piggybacks” on the status of the lead member
- The JV must be structured to allow the lead member control and appropriate benefits
 - Lead member cannot serve as “pass-through” to other members

Joint Ventures – Agreements

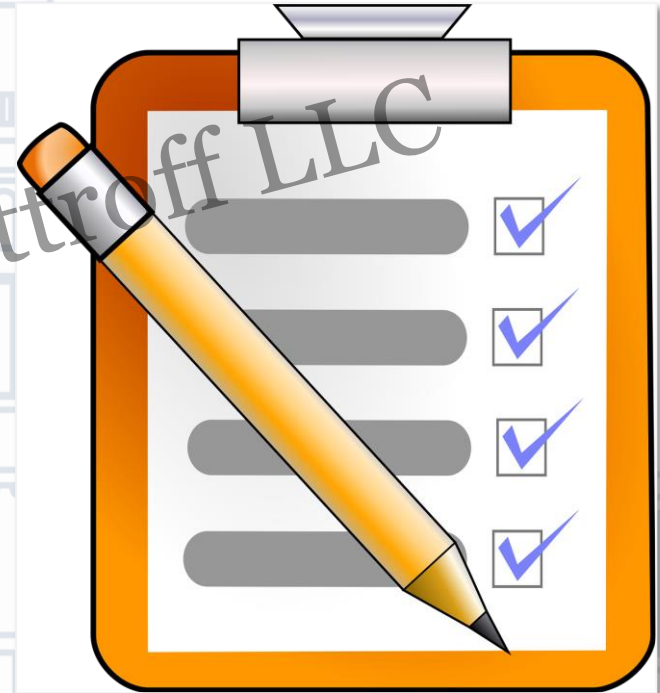
JV AGREEMENTS: THE BIG PICTURE

- All JVs must adopt written agreements, but most JVs must include certain mandatory provisions in their JV agreements
- Required provisions vary based on socioeconomic status of the solicitation the JV is pursuing
- If all JV partners are small businesses and the JV is only pursuing small business set-asides, the JVA need not include any specific terms (but still must be in writing)

Joint Ventures – Agreements

MANDATORY PROVISIONS

- Small business set-aside: **13 C.F.R. § 125.8**
- 8(a) set-aside/sole source: **13 C.F.R. § 124.513**
- SDVOSB/VOSB set-aside/sole source: **13 C.F.R. § 125.18**
- HUBZone set-aside/sole source: **13 C.F.R. § 126.616**
- WOSB/EDWOSB set-aside/sole source: **13 C.F.R. § 126.506**



Joint Ventures – Agreements

Unique Socioeconomic Requirements

- Most JVAs do not require prior SBA approval; but SBA must separately approve an 8(a) JVA for 8(a) sole source contracts.
 - Note: SBA will review JVAs in size/eligibility protests
- For VA SDVOSB or VOSB set-aside contracts only, an SDVOSB/VOSB JV must be verified by VA's CVE before proposal submission.

Joint Ventures – Agreements

JV AGREEMENTS: ADDITIONAL PROVISIONS

- In addition to mandatory JV provisions, parties should strongly consider including:
 - Dispute resolution
 - Subcontracting
 - Distributions
 - Dissolution of JV
 - Capital contributions
 - Splitting of losses
 - Taxes
 - Indemnity

Other JV Legal Matters



PERFORMANCE OF WORK

- JV members with appropriate certifications must perform at least **40%** of the JV's work
 - E.g., 8(a) member of an 8(a) JV
- The 40% number is a floor, not a ceiling!

Other JV Legal Matters

PERFORMANCE OF WORK

- The work performed by the “appropriate” entity or entities must be “more than administrative or ministerial functions”
- What is “work?”
 - SBA says use same formulas used for calculating compliance with limitations on subcontracting under 13 C.F.R. § 125.6

Other JV Legal Matters

JV AGREEMENTS: VETO RIGHTS

- Be *very careful* about minority JV members' veto rights:
 - If a joint venture is seeking an 8(a), SDVOSB/VOSB, WOSB/EDWOSB or HUBZone contract, the lead venturer must have appropriate control over the JV
 - In *Seventh Dimension, LLC*, SBA No. VET 6057 (2020), SBA OHA wrote that the SDVOSB member of the JV was required to have “unequivocal control”
 - SBA’s updated rules allow participation in corporate governance decisions as is “commercially customary”

Other JV Legal Matters

PAST PERFORMANCE, ETC.

- “When evaluating the capabilities, past performance, experience, business systems and certifications” of a JV, the procuring agency must consider the qualifications of the JV members, not just those of the JV itself
- This is part of the SBA’s five program-specific JV regulations
 - Some Contracting Officers are unfamiliar with SBA rules—don’t be afraid to (politely) quote them when needed!

Other JV Legal Matters

SECURITY CLEARANCES

- When a JV will perform cleared work, the Contracting Officer must accept the clearances of the JV members instead of insisting on a separate clearance for the JV
 - Cleared work still can only be performed by a cleared company!
 - This rule does not allow an uncleared company to “piggyback” on its cleared JV partner’s clearance



Prime/Sub Teams

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Big-Picture Principles

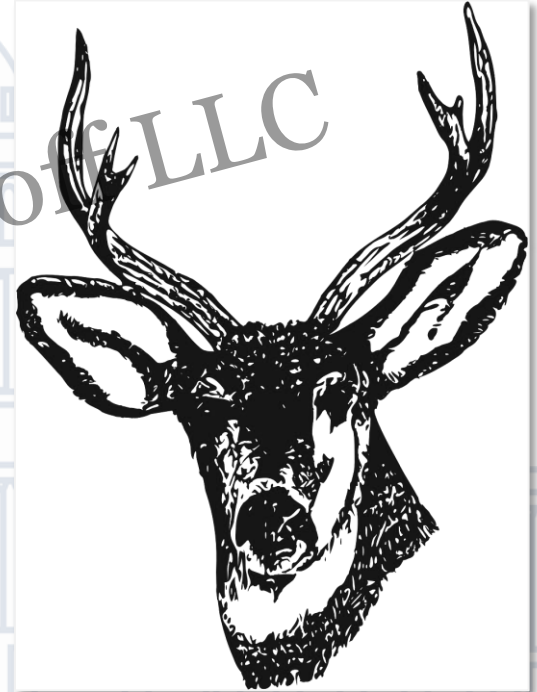
“SUBCONTRACT” IS BROADLY DEFINED

- Per FAR 3.502-1, a “subcontract” is a contract “entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment or services of any kind under a prime contract.”
- Note that 1099s, vendors, materialmen, consultants, etc. may be “subcontractors” too!

Big-Picture Principles

THE BUCK STOPS AT THE PRIME

- The prime contractor is 100% responsible for full performance of the prime contract
 - If a subcontractor walks off the job, defaults, goes bankrupt, etc., it ordinarily is no excuse (legally, anyway) for not completing the project
 - The prime can be held accountable for subcontractor violations of certain laws, like the Service Contract Act



Big-Picture Principles

CONSENT TO SUBCONTRACT

- Contractors often can subcontract to whomever they want—but not always
 - Government consent may be required for cost-reimbursement, time-and-materials, or labor-hour subcontracts, or even for fixed-price subcontracts over a certain threshold
 - Government may require consent to place certain work with subcontractors
 - See FAR 52.244-2 for more information

Big-Picture Principles

RESPONSIBLE SUBCONTRACTORS

- Subcontractors must be “responsible,” as the term is used in FAR Part 9
 - A prime generally cannot issue a subcontract over \$35,000 to an entity that has been debarred, suspended, or proposed for debarment
 - Prime should get “reps and certs” from subcontractors and check subcontractor status in SAM

Limitations on Subcontracting

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Limitations on Subcontracting

When do the limitations on subcontracting apply?

Full or partial small business set-aside contract with value greater than the simplified acquisition threshold

Any 8(a), SDVOSB/VOSB, WOSB/EDWOSB, or HUBZone set-aside or sole source contract

Note: Many contractors incorrectly believe that the LoS does not apply to socioeconomic contracts under the SAT

Limitations on Subcontracting

“NEW” (FINALLY UPDATED) LOS RULE

- Service contracts: no more than 50% of amount paid by government may be paid to entities that are not similarly situated
- Supply contracts: (except procurements from nonmanufacturers): no more than 50% of the amount paid by government may be paid to entities that are not similarly situated
- All set-aside contracts: prime may meet requirements through use of similarly situated entities

Limitations on Subcontracting

Five Step LOS Calculation

- Step 1: Determine LoS category (depends on contract's NAICS code)
 - 4 categories (Services, Supplies, General Construction, & Specialty Trade Construction)
- Step 2: Start with *the amount paid by the government*
 - Only exception: nonmanufacturers (13 C.F.R. § 125.6(a)(2)(ii) and 13 C.F.R. § 121.406)
- Step 3: Exclude certain costs (maybe)
 - Permitted exclusions depend on LoS category & many have none (many service contracts)
- Step 4: Apply minimum performance
 - Each LoS category has minimum percentage for prime's performance (+ any SSEs)
 - Services and supplies 50%; General Construction 15%; Special trade construction 25%
- Step 5: Address SSEs (maybe)

Limitation on Subcontracting

Under “new” LoS, a small prime can meet its self-performance goals by subcontracting to a “similarly situated entity”

Work performed by an SSE counts *toward* the prime’s own self-performance

SSE: same socioeconomic designation required by the prime contract (i.e., 8(a), HUBZone, SDVOSB/VOSB, WOSB/EDWOSB) and small “for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform.”



Ostensible Subcontractor Affiliation

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Ostensible Subcontractor Affiliation

THE BIG PICTURE

- SBA considers a small prime contractor affiliated with its subcontractor for purposes of a set-aside contract where:
 - The prime is “unusually reliant” upon the sub; and/or
 - The sub will perform the “primary and vital” portions of the contract
- With such affiliation, the prime’s and sub’s sizes are added together
 - If this exceed size standard, prime is ineligible and may face other penalties
- SBA evaluates on a case-by-case basis, looking at “totality” of relationship
 - Best practice: reduce/eliminate number and severity of ostensible subcontractor risk factors as identified in regulation and SBA OHA cases

Ostensible Subcontractor Affiliation

RISK FACTORS

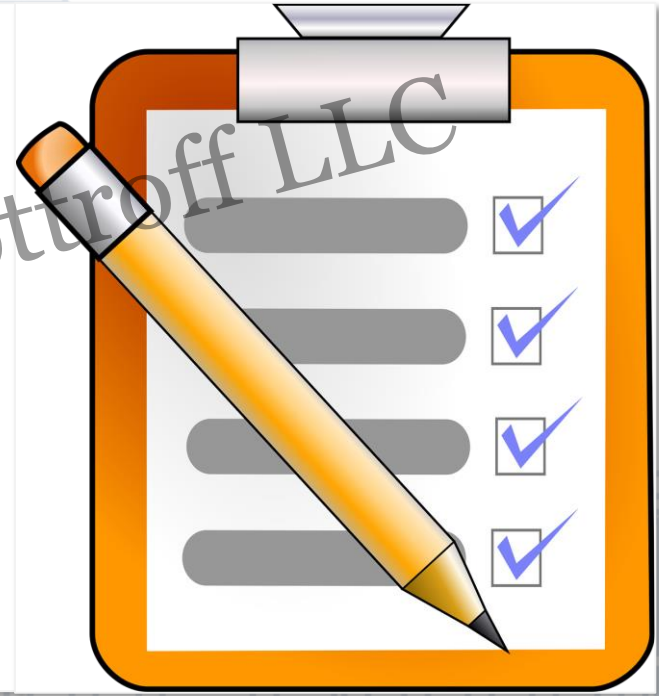
- Sub's incumbency (ineligible?)
- Prime plans to hire from sub:
 - majority of workforce
 - contract managers (e.g., PM)
- Highest-ranking contract manager (e.g., PM) on sub's payroll
- Lower-ranking contract managers (e.g., Deputy PM) on sub's payroll



Ostensible Subcontractor Affiliation

RISK FACTORS

- Prime lacks relevant experience and relied on sub's experience to win
- Prime relies on sub for critical financial assistance, bonding, equipment or facilities
- Sub will perform more complex or important tasks, while prime's role largely limited to administration
- Sub performing more work is more likely to be ostensible subcontractor than one performing less



Ostensible Subcontractor Affiliation

RISK FACTORS

- Prime and sub agree to split profits, or otherwise appear to form a *de facto* JV
- Sub prepares all or most of the proposal
- TA terms unusually favor sub or otherwise indicate sub has unusual level of control
- TA/proposal don't break down tasks between prime and sub





Teaming Agreements

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Teaming Agreements

TEAMING AGREEMENTS: THE BIG PICTURE

- FAR does not require prime/subcontractor teaming agreements
- Procuring agencies sometimes (perhaps increasingly) require teaming agreements to be submitted with proposals
 - These agencies may decline to consider a subcontractor's past performance, capabilities, etc. without a TA

Teaming Agreements



WHY USE A TEAMING AGREEMENT?

- “Lock in” commitments from prospective teammates
 - Prime doesn’t want to rely on prospective subcontractor’s qualifications & resources, only to have subcontractor decline to participate in project
 - Subcontractor doesn’t want to spend time and energy on proposal only to receive no subcontract

Teaming Agreements

WHY USE A TEAMING AGREEMENT?

- Establish rules (if any) for exclusivity
- Avoid difficult post-award disputes
- Demonstrate compliance with key requirements
 - Limitation on subcontracting
 - Ostensible subcontractor rule

Teaming Agreements

TEAMING AGREEMENTS: BEST PRACTICES

- Identify a specific project to be pursued by the prime/sub team
 - An agreement to pursue multiple projects is not a standard “teaming agreement” but another form of teaming relationship (we call these “Master” Teaming Agreements)
- Use specific agency name and solicitation number when available
 - May reference synopsis, RFI or other pre-solicitation information
- Identify which company will be the prime and which will be the sub
 - Be careful about agreement to “flip” roles—may be evidence of affiliation
 - Specify what each party brings to the table
 - If applicable, specify that prime meets applicable small business or socioeconomic requirements

Teaming Agreements

TEAMING AGREEMENTS: BEST PRACTICES

- Exclusivity provisions
 - Ensures that subcontractor will not work with any other prime contractors for the procurement and that prime will obtain certain scope from the subcontractor
 - If sub is not exclusive, consider FAR Certificate of Independent Price Determination
 - Be careful not to draft overly restrictive provisions that could run afoul of prohibition on restrictions of subcontractor sales to the government
- Resolve potential post-award disputes
 - Is subcontractor guaranteed a subcontract?
 - What, specifically, will be subcontractor's scope of work?
 - How much will subcontractor be paid?
 - Will subcontract term be coextensive with prime?

Teaming Agreements

TEAMING AGREEMENTS: BEST PRACTICES

- Division of proposal responsibilities
 - Prime usually plays the lead role
 - Sub taking lead role could be indicative of affiliation
 - Subcontractor's role usually limited to its own scope and pricing
 - Parties typically agree to “go Dutch”—each party covers its own proposal-writing expenses

Teaming Agreements

TEAMING AGREEMENTS: BEST PRACTICES

- Termination provisions
 - “For convenience?”
 - Prime decides not to submit proposal
 - Another prime contractor wins award (protests?)
 - Parties unable to agree on subcontract after negotiation
 - One party defaults
 - Disapproval of subcontractor by Government
- Nondisclosure Provisions
 - May be encompassed in a separate NDA (if so, TA should refer to NDA)
 - A fair TA equally ensures the protection of both parties’ confidential information
 - Should account for FAR whistleblower requirements (FAR 52.203-18 & FAR 52.203-19)



Subcontracts

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Subcontracts

SUBCONTRACTS: THE BIG PICTURE

- Subcontract *supersedes/replaces* the teaming agreement
 - A teaming agreement is a “chasing the contract” document; a subcontract is a “performing the contract” document
- Usually much more detailed than teaming agreement
- Must include mandatory FAR provisions (flow-downs)
- SBA regulations provide additional (sometimes little known) subcontract requirements

Subcontracts

SUBCONTRACTS: FLOW-DOWNS

- A flow-down is a provision of a prime contract that the prime contractor includes in a subcontract
- FAR requires primes to flow-down many clauses
 - Failing to flow-down, when required, is a breach of contract!
 - i.e., FAR 52.203-7 (Anti-Kickback Procedures):



Subcontracts

FLOW-DOWNS: COMMON MISTAKES

- Using “oral subcontract” or unedited commercial subcontract
 - No way to effectively flow-down FAR clauses orally and not included in commercial contracts
- Not including flow-downs in “consulting agreement,” “vendor agreement,” etc.
 - Flow-downs must be included in agreements that are subcontracts in substance, no matter the terminology
 - Even a single individual (1099) can be a subcontractor!
- Flowing-down the whole kit ‘n’ kaboodle
 - Some FAR provisions are nonsensical or otherwise problematic when flowed-down

Subcontracts

SUBCONTRACTS: BEST PRACTICES

- Subcontractor's scope of work
 - Be specific to help avoid disputes
- Payment and invoicing provisions
 - Will there be a “pay-when-paid” requirement?
 - How and when will sub be paid (e.g., fixed-price, T&M)?
- “Pass-through” dispute resolution
 - Without option to pass through claims against government, sub may have to pursue action against the prime—even if the government is to blame
 - Subcontract should address costs of pass-through (usually, each party pays its own)

Subcontracts

SUBCONTRACTS: BEST PRACTICES

- Termination provisions:
 - Commonly misunderstood: T for C is not a mandatory flow-down and may not be included under a standard incorporation by reference clause
 - What are prime (and sub) default rights, and are parties entitled to cure notice?
- Non-disclosure provisions (if no separate NDA)
- Ensured compliance with LoS (if prime contract is set-aside)
- Term of subcontract (base and options?)
- Reps & Certs (COIs, compliance with law, suspension/debarment, etc.)

Questions?

STEVEN J. KOPRINCE
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The 8(a) Program

A Guide to the SBA's 8(a) Business
Development Program - In Plain English

Volume 4: Second Edition

SHANE J. MCCALL



Procedures and Pitfalls of Size Protests and Appeals

A Guide to Size Protests & Appeals - In Plain
English

Volume 5

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