



**National Veteran
Small Business
Coalition**

Boot Camp: *Teaming Arrangements*

April 8, 2015

Devon E. Hewitt, Partner
Protora Law PLLC

Teaming under FAR 9.601

“Contractor team arrangement” means:

- Two or more companies form a *partnership or joint venture* to act as a potential prime contractor; or
- 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

Why Team?

- FAR 9.602(a) explicitly recognizes that teams *may be* desirable from the Government's standpoint
- May enable companies to:
 - Complement each other's unique capabilities; and
 - Offer the Government the best combination of performance, cost, and delivery

Types of Teaming Arrangements

- Prime Contractor/Subcontractor
- Joint Venture
- Contractor Team Arrangement (GSA)

Legal Differences

Prime/Sub Team

- Prime has sole interest and complete responsibility
- Team controlled by
 - ✓ Subcontracts written by Prime
 - ✓ Teaming Agreement
- Prime has privity of contract
- Profits and losses earned per subcontracts

Joint Venture

- Separate Legal Entity with “Members” with proportionate “interests”
- “Special Purpose” entity
- Members usually jointly AND severally liable
- Profit and losses shared proportionately

Teaming Agreements: Advantages/Disadvantages

- Advantages
 - Most common form of teaming, simple and straightforward
 - Clear reporting mechanism, hierarchy
 - Sub can avoid some govt provisions
 - Prime can control contract performance
- Disadvantages
 - Sub does not have privity with Govt
 - Subk past performance may not be considered
 - Subk past performance history not as strong as prime PP

Joint Venture Advantages

- JV provides “one stop shopping” to the Government for the combined resources of the Members (technical and other)
- JV has performance history that combines that of each Member
- JV allows each Member to cite the contract as prime contractor past performance in future proposals
- JV allows small business to be competitive as a prime contractor

More Joint Venture Advantages

- JV allows Member greater control over prime contract performance than it would have as a sub
- In certain *limited circumstances*, can allow a large contractor access to work set aside for small businesses

Joint Venture Disadvantages

- Some officials not familiar with the model; concerns arise about responsibility for contract performance or nonperformance
- Can be a challenge for Members to “speak with one voice”
- Depending on JV structure, a Member may get less work than it would as a sub or a single Prime
- More paperwork and more complicated to set up a joint venture – can be more expensive

More Joint Venture Disadvantages

- ALL the liabilities are shared by ALL the Members
- Joint Venture relationships are harder to exit if they don't work
- If competing for VA SDVOSB set-aside, JV must be verified in addition to having members individually verified

Teaming Agreement Issues

Teaming Agreement General Provisions

- Identification of procurement opportunity
- Parties' respective responsibilities as to proposal preparation and submission
- Confidentiality provisions
- Termination
- Intent to enter into a subcontract

Teaming Agreement Important Provisions/Subcontractor

- Exclusivity
- Proposal Preparation
- Guarantee of Award of Subcontract
- Work share

Teaming Agreement

Negotiating Important Provisions/Sub

- Exclusivity
 - Define scope
 - Intersects with termination provision
- Proposal Preparation
 - Identify proposed subcontractor in proposal
 - Can provide pricing directly to Government
 - Review of proposal prior to submission
 - Affiliation concerns

Teaming Agreement

Negotiating Important Provisions/Sub cont.

- Guarantee of Subcontract Award
 - Prime must try to get CO approval of subcontractor
 - Pricing must reflect subcontractor pricing included in proposal or provided Prime

 - Work share
 - Enforceability issues
 - Period of Performance of subcontract
 - Prime termination rights

Joint Venture Issues

Small Business Joint Venture Issues

- Special requirements for a Joint Venture bidding on a small business set-aside contract
 - SDVOSB JV bidding on *VA SDVOSB set-aside* has to be independently verified by VA
 - **3 in 2 rule** - JV limited to three awards in two years
 - May receive more than 3 awards if offer leading to 4th award submitted prior to JV receiving third contract
 - May create additional JVs after receiving 3 awards

Small Business Joint Venture Issues cont.

- Members of an Joint Venture bidding on a small business set-aside contract are ***affiliated*** unless
 - JV is between two or more small businesses *and certain conditions are satisfied*, or
 - JV is between a “Mentor” and a “Protégé” under SBA’s 8(a) Program or DoD’s Mentor/Protégé Program
- If affiliated, “size” of Members aggregated and JV may be not be “small” and eligible to bid on set-aside contract

Conditions for Small Business JV Affiliation Exemption

- All members are “small” under the size standard for the NAICS code assigned the solicitation **and**
- Procurement is a bundled requirement **or** procurement value is...
 - More than \$10 million for employee-based size standards
 - More than one-half the applicable size standard for revenue-based size standards

Conditions for Small Business JV Affiliation Exemption

- Large and small businesses in SBA's Section 8(a) Program Mentor-Protégé Program and JV agreement meets certain requirements
 - Congress has authorized SBA to establish a M/P program for all small businesses
 - SBA about to issue new performance of work rule, may lessen the need for joint ventures
 - Small businesses opted for joint ventures in order to make sure prime performed 51% of labor, but now small business subcontractor work can be used to satisfy performance of work requirements

Successful JV Lessons Learned

- They have “educated consumers” as customers
- The Members have a “shared vision”
 - Focus on Customer
 - Understanding of JV purpose
 - Understanding of JV agreement
- Most are a separate legal entity
- They operate under a written agreement with...
 - Clear Member roles on operations, contracts, books/records and finances
 - Clear processes for voting, termination, disputes

“Other” JV Lessons Learned

- Consumer does not understand the JV entity
- No clear, single objective
- No single POC/Lead Member/“single voice”
- No written agreement/general agreement
- Differing or unclear Member expectations
- Differing corporate cultures/operational styles
- Imbalance in expertise, resource contributions, or investment by Members

Questions?

Contact Information:



Devon E. Hewitt
(703) 942-6746
dhewitt@protoraelaw.com