ABC's of JVs in the Federal Marketplace

SECAF Gov Con CXO Forum

October 25, 2017

SECAF

Small and Emerging Contractors Advisory Forum

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What is a Joint Venture?

- A business arrangement whereby the parties agree to develop, for a finite time, a new entity and create new assets by contributing equity
- A form of "teaming" under FAR 9.601
- Key characteristics:
  - Typically a separate legal entity (generally a partnership or LLC)
  - Includes "members" with proportionate interests in the entity
  - Limited in duration
  - Special purpose
  - Sharing of profits and losses among members

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Why form a Joint Venture?

- To combine member resources
- To use members' past performance
  - ➢ New rule requires agencies to consider past performance of each joint venture member
  - ➢ Joint venture approach may be necessary if solicitation states that subcontractor past performance will not be considered
- Take advantage of member's facility clearance
- A contractor likely is more able to establish direct agency contacts if a joint venture member as opposed to a subcontractor

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Why form a Joint Venture?

- Prospective subcontractor may have more control over prime contract performance if a joint venture member

- **M/P Joint Ventures allow "other than small" contractors to have access to procurement dollars set-aside for small/8(a) businesses without "affiliation" concerns**
  - *Allows an "other than small" potential subcontractor to avoid contracting restrictions in "limitations on subcontracting" clause, "other than small" Joint Venture member is able to perform greater than 49% of prime contract work or receive greater than 49% of amounts paid/profits related to prime contract*

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What is a SBA Joint Venture?

- A Joint Venture looking to compete in a **small business or a Section 8(a) set-aside** competition must meet SBA's definition/rules for joint ventures
- SBA defines the term "joint venture" as an "association of concerns or individuals" that combine their "efforts, property, money, skill or knowledge"
  - but NOT on a continuing basis for "conducting business generally"
- The joint venture must have the limited purpose of receiving three (3) contracts in two (2) years (known as the "3 in 2" rule)
  - 2 year time period begins with first contract award
  - JV can be awarded more than 3 contracts if proposals submitted after second award but before expiration of 2 year period
  - Parties to the JV can form another, new joint venture after receiving three contract awards or expiration of two-year period

What is a SBA Joint Venture?

- Joint Venture agreement must be in writing
- Joint Venture must do business in its own name
- Joint Venture must be registered in SAM
- Joint Venture can be "informal" (partnership) or "formal" (separate legal entity)
  - ➢ If Joint Venture is separate legal entity (usually an LLC), must be "unpopulated" except for administrative personnel
  - ➢ If Joint Venture is separate legal entity, best practice is to have a Joint Venture Agreement and an Operating Agreement (LLC)
    - ➢ Execution of documents technically does not have to occur prior to submitting a bid or proposal but doing so is a best practice; but Joint Venture must be registered in state and in SAM

Limitations on Subcontracting

- Joint Venture itself, through both members, must comply with the FAR Limitations on Subcontracting clause and SBA regulations addressing limitations on subcontracting
  - Together, the members must perform greater than 50% of the cost of the contract incurred for personnel (for services contract) (FAR clause) or
  - Together, the joint venture must receive at least 50% of the amount the Government pays the joint venture (SBA regulations)

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Affiliation

- SBA regulations provide that joint venture members are affiliated for size purposes
  - Once two businesses are determined to be "affiliated", SBA will aggregate the size of both companies to determine whether the joint venture is "small" for a Section 8(a) or "small business" set-aside
- "Small" refers to size standard associated with NAICS code applicable to the procurement
- If aggregated size of joint venture members is greater than size standard, the joint venture is not eligible to compete for set-aside contract
- **Three exceptions** to this affiliation rule for joint ventures

Exceptions to affiliation rule for JVs

1. Where all members of the joint venture are **"small"** under the applicable size standard;
2. **"All Small" Mentor/Protégé** joint venture provided Protégé is small under applicable size standard and joint venture agreement complies with SBA regulations; and
3. **Section 8(a) Program Mentor/Protégé** joint venture provided 8(a) member is small under applicable size standard and joint venture complies with SBA regulations
   - If joint venture seeking award of a sole-source contract, the 8(a) cannot have reached certain dollar limits

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Mentor/Protégé Joint Ventures

- Members are typically an "other than small" business and a "small" business or a Section 8(a) concern
- Joint Venture cannot claim the affiliation exception until SBA approves the applicable Mentor/Protégé agreement
- SBA only needs to approve a Section 8(a) Joint Venture Agreement and then only where the Joint Venture is seeking to compete in *a Section 8(a) set-aside procurement*
  - But Joint Venture agreements should comply with Section 8(a) joint venture regulations in order to defend against a size protest

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M/P Joint Ventures – Requirements

- M/P joint ventures must be "unpopulated"
- "Small" or 8(a) member must perform at least 40% of the work
- Each member must receive profits *commensurate with work performed*
- "Small" or 8(a) member must control Joint Venture and own at least 51% of the Joint Venture
- "Small" or 8(a) member must be "Managing Venturer"

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M/P Joint Ventures – Requirements cont.

- Employee of "Small" or 8(a) or member must be Project Manger and responsible for performance of the contract
  - Project Manager may be contingent hire
  - Project Manager cannot have been previously employed by Mentor
- Bank account must be established in name of Joint Venture
  - All payments to Joint Venture must be deposited into account
  - All contract expenses must be paid from account
  - Signature of both members required for withdrawal of funds

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M/P Joint Ventures – Requirements cont.

- Each member must ensure performance and completion of 8(a) or "Small" set-aside contracts even if a member withdraws
- Joint Venture Agreement must identify "major equipment, facilities and resources" contributed by each member and cost/value of each
  - Relaxed requirements for MAS/IDIQ procurements
- Joint Venture Agreement must identify role of each member in negotiating contract, providing labor, contract performance
  - Relaxed requirements for MAS/IDIQ procurements
- 8(a) or "Small" member must keep accounting and administrative records as well as final records
- Financial statements and reports must be submitted to SBA
- Certificates of Compliance

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Unpopulated SBA Mentor-Protégé Joint Venture

JOINT VENTURE
Unpopulated

- Acts as a pass-through
- JV must comply with limitations on subcontracting regulations

PROTÉGÉ

- *De facto* subcontractor
- Must perform at least 40% of JV contract work
- Must receive profits according to % of work performed

MENTOR

- *De facto* subcontractor
- Can perform up to 60% of JV contract work
- May receive up to 60% of JV profits because no profit remains in unpopulated JV

SUBCONTRACTORS

- Can only perform up to 49% of cost of JV contract incurred for personnel or receive up to 49% of amounts Govt. has paid JV
- Can be Mentor or Mentor affiliate under certain conditions

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Joint Venture Advantages - Small Businesses

- Allows small businesses to chase more complex procurements and allows for one-stop shopping by the government
- Allows small businesses to become a prime and receive prime contractor past performance
- Allows small businesses to be on "front line" with the client
- Allows small businesses to remain small longer

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M/P Joint Venture Advantages – Mentors

- Can access contract revenue reserved for "small" businesses and for which Mentor typically is ineligible to receive
- Can perform up to 60% of the contract work
- Mentor can also own up to 40% of the Protégé
- Allows Mentor to break into agency where Protégé has a niche
- Allows Mentor to have greater control over contract performance than if it was a sub

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Joint Venture Disadvantages

- Can be a challenge to speak with "one voice"
- Difficult for a member to exit
- Additional paperwork and expense
- Mentor has limited control over Joint Venture decisions
- Competition concerns
  - Which opportunities should Joint Venture chase?
  - Which opportunities may a member chase on its own?
  - What if there are two tracks?

Questions?

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