

Teaming Agreements and Joint Ventures

Jim Nagle
Oles Morrison Rinker & Baker, LLP

TEAMING ARRANGEMENTS

What do we live for, if it is not to make life less difficult for each other?

-- **George Eliot**

What is a teaming ARRANGEMENT?

- Two types of teaming arrangements exist in federal contracting: Teams and Joint Ventures.
- FAR 9.601 defines a “contractor team arrangement” as (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

Why does the Government like teaming arrangements?

- ◉ **FAR 9.602** : Contractor team arrangements are desirable because the firms can:
 - > Complement each other's unique capabilities; and
 - > Offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.

More reasons the Government likes teaming arrangements:

- Reduction in administrative burden
- Single point of contact
- Reduction in program management
- Support small businesses, foster mentor-protégés
- Increase competition (save money)
- Encourage innovation
- Reduce risk

Why do firms like teaming arrangements?

- ◉ Increase profits
- ◉ Work on large procurements
- ◉ Take advantage of relaxed “affiliation rules” for small businesses
- ◉ Expand market
- ◉ Minimize financial risks
- ◉ Develop relationships and build on relationships with government agencies
- ◉ Increase competitiveness

What are the limitations on teaming Arrangements?

- **Full disclosure:** FAR 9.603 provides the team must be identified and company relationships fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective.
- **Government retains discretion:** FAR 9.604 provides the Government preserves its rights to consent to the arrangement and pursue its own public policy goals.

TEAMING AGREEMENTS

Once it's established that we are a team, I can demand of you and expect you to demand of me. Life without pain is an addiction and the fantasy of perpetual happiness is like the "delusion of fusion."

-- **Carl Whitaker**

What is a TEAM?

- FAR 9.601(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."

What are the limitations on Teaming Agreements?

- Teams are treated as prime contractor and subcontractor arrangements so the size status standards still apply, including:
 - > Performance of Work Requirements
 - > Ostensible Subcontractor Rule

Performance of the work requirements

- FAR 52.219-14 Limitations on Subcontracting requires:
 - > Services: At least 50 percent of the cost of contract performance
 - > Supplies : At least 50 percent of the cost of manufacturing the supplies, not including the cost of materials.
 - > General construction: At least 15 percent of the cost of the contract.
 - > Specialty Construction: At least 25 percent of the cost of the contract.
- *See also* FAR 52.219-27 (Total Service-Disabled Veteran-Owned Small Business)

Ostensible Subcontractor Rule

- 13 C.F.R. 121.103 (h)(4): An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant.

Where to begin in drafting your Teaming Agreement?

- Ultimately, teams will have 2 contracts:
 - > Teaming Agreement
 - > Subcontractor Agreement
- Tip: the Subcontract Agreement can be an exhibit to the Teaming Agreement to save time in drafting over time.

Drafting Pointers: Proposal Stage

- Proposal
 - > Allocate member responsibilities for the proposal
 - > Identify compensation, if any, for pre-bid efforts
 - > Copies of RFP to be distributed to team members
- Qualifications
 - > Each party may certify that they have a satisfactory past performance record that will not negatively impact their ability to effectively compete for new business
- Scope of agreement
 - > Limit purpose to specific RFP
 - > Good faith understanding that the parties will negotiate a subcontract if the team is successful in winning an award

Drafting Pointers: Management

- ◉ Contract management
 - > Clearly explain roles of each member
 - > Protect proprietary information and employees
 - > Make prime contractor single point of contact, solely responsible for daily management
 - > Guarantee exclusivity (no cheating!)
- ◉ Dispute resolution and termination
- ◉ Profits

JOINT VENTURES

Oh! Surely marriage is a great and sacred responsibility. It is a bark in which two souls venture out on life's stormy sea, with no aid but their own to help them.

- **James Hamilton**

What is a JOINT VENTURE?

- FAR 9.601(1): "Two or more companies form a partnership or joint venture to act as a potential prime contractor."

What are the potential forms of a Joint Venture?

- ◉ The joint venture is an independent entity. Options for establishing an independent entity include:
 - > Partnership
 - > Limited Liability Company
 - > Corporation (more formalities)

What are some unique benefits of a Joint Venture?

- Provide companies with the opportunity to obtain new capacity and expertise
- Allow companies to enter into related businesses or new geographic markets or obtain new technological knowledge
- Divestiture and acquisition: roughly 80% of all joint ventures end in a sale by one partner to the other.

What are the limitations on Joint Ventures?

- ◉ Joint ventures can be created according to the needs of the partners so long as the JV is disclosed.
- ◉ However, if the Joint Venture seeks to bid on set-aside contracts, then affiliation rules involve important limitations.

Joint Venture = Affiliation

- ◉ The members of a joint venture or team are considered to be affiliated for size purposes.
 - › The size of each team member contributes to the total size of the joint venture or team.
 - › The joint venture or team is small only if the combined annual receipts or employees of all the firms in the JV meet the size standard for the procurement.

Automatic Affiliation

- Business size calculation:
 - > **Manufacturers & Wholesalers:** Number of employees over 12 months. The calculation: the average number of all individuals employed on a full-time, part-time or temp basis over last 12 months.
 - > **All others:** Average annual gross receipts for all other industries. The calculation: the average total gross revenue for the last 3 years.
- View your NAICS size standard at:
<http://www.sba.gov/size/>

The 3/2 Rule

- A joint venture cannot submit more than 3 proposals over a 2 year period.
- The clock starts running with the submission of the first proposal.

Relaxed Affiliation Rules

- Certain receipt standards and employee based standards have relaxed affiliation rules such that only one team member needs to qualify as small
- For bundled procurements, FAR 19.101(7) requires the small business size standard to be applied to the individual small business concerns, and not to the combined assets of the joint venture.
- Performance of work requirements are waived under relaxed affiliation rules

Size Exception (1st example) SDB Program

- Benefit:

- > Price adjustment

- Requirements:

- > A joint venture of at least one SDB and one or more other business concerns may submit an offer as a small business for a competitive procurement as long as each concern is small according to the applicable NAICS code assigned to the contract.

Size Exception (2nd example)

8(a) Mentoring Program

- Benefit:
 - > Exclusive 8(a) set-asides
 - > Allowed to pursue any procurement
- Requirements:
 - > Joint venture is “small” so long as protégé qualifies
- Watch out:
 - > 8(a) Non-Approved Mentor Protégé requires that each member must be “small” and that at least one member must be less than $\frac{1}{2}$ of the size standard

Size Exception (3rd example) SDVOSB Program

- Benefits

- > Sole source contracts
- > Restricted competitions
- > Additional credit evaluation factors

- Requirements:

- > VA Contracting officers must review and approve under the SDVOSB procurement program.
- > Each party must be a small business and the managing partner must be a SDVOSB or, depending on the threshold, the JV must qualify under the threshold.

Where to begin in drafting your Joint Venture agreement?

- ◉ Joint ventures can be created according to the needs of the partners so long as the JV is disclosed.
- ◉ However, if the Joint Venture seeks to bid on set-aside contracts, check out your agency. Many agencies have Joint Venture forms they prefer to use – be sure to check ahead of time!
- ◉ Joint Venture agreement must be approved before the bid can be submitted!

Drafting Pointers: Boilerplate language

- The contract is in the name of the joint venture entity.
- The joint venture entity is responsible for contract performance.
- Joint venture members are individually and equally liable for contract performance.
- Joint venture members share profits and risk of loss
- Indemnification provisions exist to protect the joint venture from the negligent actions or inactions of a joint venture member.

Drafting Pointers: Unique arrangements

- ◉ Pre-award efforts: who is paying/negotiating?
- ◉ Contributions: who is providing the initial capital?
- ◉ Project control: who is managing?
- ◉ Administration: which employees are dedicated?
- ◉ Performance: what is the SOW?
- ◉ Intellectual property: who owns what information?
- ◉ Profits and also losses: what is the sharing going to look like?
- ◉ Disputes: what happens if there is a conflict?

Drafting Pointers con.'t

- ◉ Insurance: will existing insurance cover the JV?
- ◉ Outside consultants: who hires/fires?
- ◉ Taxes: what about personal property and business?
- ◉ Duration: when does the JV terminate?
- ◉ Assignments: can a member assign it's interest?
- ◉ Are there any anti-trust implications?

Concluding Thoughts



Tips for finding your teammate or your partner!

- ◉ Industry reputation
- ◉ Past treatment of small businesses
- ◉ Past performance history with government agencies
- ◉ Technical and Corporate Compatibility

