“Get on the Joint Venture Train”

Small Business Joint Ventures for Government Contractors

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Overview

- Introduction
  - Teaming Agreements v. Joint Ventures (JVs)
- Business Structure of JVs
- SBA JV Rules/Regulations and Affiliation
- Questions

Introduction:
Teaming Agreements v. JVs

Team Arrangements

- FAR 9.601 uses the term "Contractor Team Arrangement"
- Describes **two** kinds of relationships:
  - Joint Venture: Two or more companies form a partnership or joint venture to act as potential prime contractor; or
  - Teaming Agreement: A potential prime contractor agrees with one or more other companies to have them act as its subcontractor(s) under a specified government contract or acquisition program.

Partnering/Joint Venturing

- Describes a relationship (contract) where two or more persons (companies) share management functions and share profits/losses (More about this later)

- Partnering for specific procurement(s)/ project(s) is a Joint Venture (More on the regulations governing this later)

When to Team (including JVs)

- FAR 9.602 recognizes the benefits of teaming arrangements
  - Contractors 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.

FAR Limitations

- Under FAR 9.604, team arrangements may not:
  - Violate antitrust statutes, or
  - Limit the Government's rights to:
    - Require consent to subcontracts;
    - Determine the responsibility of the prime contractor; or
    - Hold prime responsible for performance.

Teaming Agreement v. JV

- Study the solicitation
  - How does the capability of the company measure up to the evaluation factors?
    - Technical ability
    - Key personnel
    - Past performance
    - Small business set-aside or subcontracting plan requirement

Business Structure of JVs

Business Structure of JVs

- Either a contractual relationship or a legal entity (corporation, limited liability company or partnership).
- JV is the offeror/bidder to government.
- Contractual privity will be between JV and government.
- Can be populated or unpopulated.
- JV members can be subcontractors in unpopulated JVs.
- JV is <u>not</u> a quick way to assemble a team without addressing scope of work issues.

JV vs. Teaming Agreement

- Benefits of JV:
  - The joint venture can be put in place and cover **multiple RFPs and contracts**
    - "3 in 2 Rule" (More about this later)
    - New Joint Ventures between same Partners
  - The management, control and profit/loss distribution issues usually get addressed up front.
  - May be able to manage overhead and mark-up -- important if price is a major source selection criterion.

JV vs. Teaming Agreement, (cont.)

- Drawbacks of a JV:
  - A partner in a JV may suffer liability and/or profit/cost exposure for the acts/omissions of its joint venture partner.
  - Management of joint venture partner disagreements may be difficult.
  - Contractors use it (wrongly) to avoid scope of work issues until prime contract award.
  - Termination of a joint venture is more difficult than termination of a Subcontract.

JV vs. Teaming Agreement, (cont.)

- Benefits of teaming agreement approach
  - Less expensive to set-up
    - No corporate filings
    - No tax implications
  - Less complicated relationship
- Drawbacks to teaming agreement approach
  - Potential conflicts between teaming agreement and the subcontract
  - Structure does not necessarily lend itself to joint, cooperative management of project
  - Less of a commitment between the parties
  - Prime's Mark-Up on Top of Sub's Mark-Up

Joint Venture Agreement – Key Points

1(a). Stated Purpose of JV
- Scope
- General Affiliation v. Specific Affiliation

1(b). Competition Outside the JV
- Multiple Award Contract
- Other Contract Vehicles / Same Customer
- Other Customers

Joint Venture Agreement – Key Points (cont'd)

2. Sharing and Division of Work
   - Business Plan
   - Proposal Preparation
   - Contract Work Allocation
     - By Facility
     - By Type of Work
     - By Phase of Contract
     - By Task Order
     - By Percentage of Work
     - Compliance with SBA Percentage of Work Minimum

Joint Venture Agreement – Key Points (cont'd)

3. Registration / Government Approvals
   - Disclosure of JV to Contracting Agency
   - SBA Approval of JV for 8(a) JVs
   - Facility Security Clearance
   - Personnel Security Clearance
   - CCR Registration
     - In July 2012, CCR migrating to System for Award Management ("SAM")
   - DUNS
   - TIN

Joint Venture Agreement – Key Points (cont'd)

4. Sharing of Profits & Losses
   - Populated v. Unpopulated JV
   - % Ownership v. Work Share

Joint Venture Agreement – Key Points (cont'd)

5. Financial Management
   - Pricing
   - Certifications to the Government
   - Invoicing responsibility
   - Bank Account Operation
   - Disbursement Approvals
   - Accounting (Systems & Personnel)
   - Audit Rights and Responsibilities
   - Taxes

Joint Venture Agreement – Key Points (cont'd)

6(a). Financial Commitments

- Capitalization of JV
- Additional Capital Calls
- Loans to JV
- Bonding
- Remedies for Default
- Cost Overruns : Allocation of Exposure

Joint Venture Agreement – Key Points (cont'd)

6(b). Financial Arrangements (continued)

- Profit/Loss Sharing
- Fee Share
- Reimbursement of Expenses
- Compensation of JV Officers
- Asset Ownership
- JV Liabilities:
  - Joint
  - Joint & Several
  - Separate
  - Indemnification

Joint Venture Agreement – Key Points (cont'd)

7. Project Management
   – Managing Venturer
   – Board of JV / Executive Committee
   – Project Manager
   – Subcontracts Management
   – Human Resources responsibility
   – Authority to Bind JV
     • Prime Contract
     • Modifications
     • Subcontracts

Joint Venture Agreement – Key Points (cont'd)

8. Intellectual Property Rights (IPR)
   - License of One Party's IPR
   - Joint or Individual Ownership of new IPR
   - Solely Developed IPR
   - One Party's data
   - Joint data
   - Jointly Developed IPR
   - Government Rights in IPR
   - Filings, Markings

Joint Venture Agreement – Key Points (cont'd)

9. Claims / Default / Disputes
   - Claims (Changes) Against Government
     - Certification
     - Approval Process
   - Claims By Government
     - Who Defends (Expense)
     - Settlement Authority

Joint Venture Agreement – Key Points (cont'd)

9. Claims / Default / Disputes (continued)
   - Disputes with Government
     - Lead Partner
     - Cost Sharing
   - Claims / Disputes <u>between</u> JV Partners
     - Delay by One Partner
     - Defective Work
     - Default
     - Cure Rights by Non-Defaulting Partner
     - Indemnification

Joint Venture Agreement – Key Points (cont'd)

9. Claims / Default / Disputes (continued)
   - Negotiations / Executive Resolution / Mediation / Arbitration
10. Termination of JV (Pre-Nup)
    - Disapproval by Government
    - Non-responsibility of either partner
    - Suspension or debarment
    - Bankruptcy or reorganization
    - Uncured Default
    - Completion of Contract
    - Warranty Obligations

Joint Venture Agreement – Key Points (cont'd)

11. Performance Evaluations
    - Populated v. Unpopulated JV

SBA JV Rules/Regulations and Affiliation

SBA JV Rules/Regs

- When the new 8(a) regulations were finalized in 2011, SBA also clarified its regulations governing Joint Ventures.

- 13 CFR 121.103(h) provides:

  A joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out **no more than three specific or limited-purpose 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**.

Important Take-away

- While the regulations absolutely allow for JVs for a specific procurement, they also allow for a JV to be used by the same partners for multiple procurements.

- The only limit is the so-called “3 in 2” rule.

JV Rules/Regs (cont.)

- The SBA tried to clarify what is known as the "3 in 2" Rule, but it is still a bit complex:
  - ". . . a specific joint venture entity generally **may not be awarded more than three contracts over a two year period**, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for all purposes. Once a joint venture receives one contract, SBA will determine compliance with the three awards in two years rule for future awards as of the date of initial offer including price. As such, an individual joint venture may be awarded more than three contracts **without SBA finding general affiliation between the joint venture partners** where the joint venture had received two or fewer contracts as of the date it submitted one or more additional offers which thereafter result in one or more additional contract awards." (13 CFR 121.103(h))

JV Rules/Regs (cont.)

- Here is some more SBA regulatory guidance on Joint Venture formation:

  - "The same two (or more) entities may create **additional joint ventures**, and each new joint venture entity may be awarded up to three contracts in accordance with this section. **At some point, however, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them**. For purposes of this provision and in order to facilitate tracking of the number of contract awards made to a joint venture, **a joint venture must be in writing and must do business under its own name, and it may (but need not) be in the form of a separate legal entity, and if it is a separate legal entity it may (but need not) be populated (*i.e.,* have its own separate employees).**"

Key Points to Remember

- In full and open competition – or a procurement where size does NOT matter, Affiliation between a large and small business does not matter (with some exceptions for the small business).

- In set aside procurements (such as small business set-aside, SDVOSB, 8(a), HubZone or WOSB set asides) – in other words, procurements where size does matter -- Affiliation also matters.

- Two kinds of Affiliation:
  - General Affiliation (affiliates for all purposes)
  - Specific Affiliation (affiliated for a particular procurement)

SBA Size Standards

- Annual receipts: Total receipts of the concern over its most recently completed three fiscal years divided by three (13 C.F.R. 121.104); or
- Number of employees: The average number of employees of the concern is used (including the employees of its domestic and foreign affiliates) based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months. (13 C.F.R. 121.106)

Affiliation

- In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and <u>all of its domestic and foreign affiliates</u> (13 C.F.R. 121.103 (a)(6))
- This means all affiliates are counted <u>together</u> for size determination purposes.

Affiliation in Joint Ventures

- VERY IMPORTANT:
  - Joint venturers are **presumed** to be affiliated with each other for the procurement for which they are joint venturing (this is "specific affiliation").
  - This means that, generally, a large business CANNOT joint venture with a small business for Small Business set-aside, SDVOSB, 8(a), HubZone or WOSB set aside procurements.
  - Of course, whether a business is considered large or small depends on the NAICS code for that particular procurement.

Relaxed JV Specific Affiliation Rules

- There are relaxed Affiliation Rules (i.e., no "specific affiliation") for "certain procurements", BUT:
  - Each joint venturer must be within size standard (i.e., this exception does not work if one of the JV members is large for that particular procurement). (13 CFR 121.103(h)(3)(i))
- What are these "certain procurements" ?
  - Bundled contracts, of any contract value (13 CFR 125.2(d)(1)(i)) <u>or</u>
  - Receipts size standard – procurement exceeds ½ of the size standard of the NAICS code (13 CFR 121.103(h)(3)(i)(B)(1)) <u>or</u>
  - Employee size standard – procurement exceeds $10 million. (13 CFR 121.103(h)(3)(i)(B)(2))

Exceptions to Affiliation (General & Specific)

- A couple of other exceptions:
  - Approved SBA 8(a) protégé and its mentor (can be a large business) are not considered to be affiliates when they form an SBA-approved JV and comply with other regulations. (13 CFR 121.103 (h)(3)(iii))
  - Approved protégé and its mentor under the DOD Mentor Protégé program (www.acq.osd.mil/osbp/mentor_protegee) (Mentor can be a large business) are not considered affiliates simply because of assistance provided under Mentor Protégé Agreement, **but, importantly, no exception for JV affiliation in the regulations.** (13 CFR 121.103(b)(6))

Key Take-aways for Specific Affiliation

- If full and open competition, Affiliation does not matter for that procurement (but could matter for small business partner on other procurements).

- If a small business set-aside, SDVOSB, 8(a), WOSB or HubZone set-aside cannot JV with a large business (unless 8(a) Mentor Protégé).

- If both JV partners are small, they can JV on a small business set-aside (or SDVOSB, 8(a), WOSB or HubZone set-aside) for “certain procurements”.

More about General Affiliation

- Three (3) ways to be found to be "generally affiliated":
  - Violate the "3 in 2" Rule;
  - Create so many joint ventures (even though "3 in 2" Rule is not technically violated) that SBA finds a "longstanding inter-relationship or contractual dependence" between the JV partners;
  - Traditional Avenues of Affiliation
    - Control or power to control (affirmative or negative control), ownership, management, or previous relationships (teaming and subcontracting).

Percentage of Work Requirements

- Limitation on Subcontracting Rules still apply in JV context (small business, SDVOSB, 8(a), HubZone, WOSB). The JV must perform:
  - Services (50%)
  - Supplies (50%)
  - General Construction (15%)
  - Specialty Construction (25%)

Additional Percentage of Work Req.'s for 8(a) JVs

- The 8(a) JV partner has to perform at least 40% of work performed by the JV (including work done by non-8(a) partner at any subcontracting level).

JV Req.'s for 8(a) Contracts

- The SBA must approve the JV agreement, prior to award (Contract Specific Approval)
  - All parties must be small and procurement must exceed minimum size
  - 8(a) firm must manage
  - 8(a) firm must furnish project manager
  - If Populated JV, 8(a) firm must receive at least 51% of profits
  - If Unpopulated JV, each partner receives profit on its percentage of the work
  - 8(a) firm must perform at least 40% of the JV's work in an unpopulated JV

JV Regs for HubZone Contracts

- Unique requirement: all partners must be HubZone contractors.
- The procurement must meet certain size requirements for the partners' receipts/employees not to be combined for size determination.
- For HubZone set-asides, a HubZone JV and HubZone subcontractors (in the aggregate) must incur at least 50% of the labor costs on contracts for services.
- For construction contracts, the HubZone JV itself must satisfy the 25%/15% requirement.

JV Regs for SDVOSB Contracts

- Managing partner must be SDVOSB.
- Project Manager must be a specific named individual employed by the SDVOSB.
- All partners must be small.
- 51% or more of profits must go to SDVOSB.
- The procurement must meet certain size requirements for the partners' receipt/employees not to be combined for size determination.
- We believe the JV and SDVOSB subcontractors collectively may satisfy the minimum percentage of work (limitation on subcontracting).

JV Reg's for WOSB/EDWOSB Contracts

- Procurement must meet certain size threshold for partners' receipts/employees not to be combined for size determination.
- WOSB/ED WOSB designated in CCR/SAM.
- Written JV agreement must be furnished to the Contracting Officer.
  - Managing Venturer
  - Project Manager
- 51% of profits or more to WOSB/ED WOSB.
- The JV must satisfy the minimum percentage of work (limit on subcontracting).

Questions