



Part 3 of the Women-Owned Small Businesses (WOSBs) and Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) Webinar Series

THERE'S NO "I" IN TEAM: UNDERSTANDING HOW TO EFFECTIVELY TEAM ON A FEDERAL PROJECT



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for
Women Impacting Public Policy



Agenda

1. Teaming: A Primer
2. Why Team?
3. Is Teaming Right for Your Company?
4. Essential Elements in Good Teaming Agreements
5. Key Considerations/Size Status Concerns
6. Protecting Your Interests
7. Recent Developments

Pertinent Regulations

- **Federal Acquisition Regulation (“FAR”)**
- **Agency Supplemental Acquisition Regulations**
(may supplement, but never contradict, the FAR)
- **Agency Guidance**



Teaming Agreements

A Primer

FAR 9.601 Definitions of a “Team Arrangement”

A “Contractor team arrangement,” as used in this subpart, means an arrangement in which–

- (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.



Teaming Agreements

A Primer

FAR 9.602 on “Team Arrangements”

Such Arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to-

1. Complement each other’s unique capabilities; and
2. Offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.



Teaming Agreements

A Primer

FAR 9.603 on “Team Arrangements”

The Government “will recognize the integrity and validity of contractor team arrangements, provided, the arrangements are identified and company relationships are fully disclosed in an offer, or for arrangements entered into after submission of an offer, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of contractor team arrangements...”



Teaming Agreements

A Primer

FAR 9.604 Limitations on Teaming:

Teaming Agreements may not:

- **Violate Antitrust Statutes**

- **Limit Government's rights to**
 - **Require consent to subcontracts;**
 - **Determine the responsibility of the prime contractor; or**
 - **Hold prime responsible for performance**

WHY TEAM?



The Rules of the Game Have Changed - *Are You Prepared?*

What you Need to Know:

- **Sealed Bidding (FAR Part 14) is Less Common**
- **Contracting by Negotiation (FAR Part 15) is More Common**
 - **Need to understand difference: Lowest Price v. “Best Value”**
- **Important Acronyms in Federal Contracting**
 - **IDIQs**
 - **MATOCs (and SATOCs)**
- **Increasing Number of **SMALL BUSINESS SET-ASIDES****



Contracting by Negotiation Understanding the Process...

- **Typical Evaluation Factors**
 - **Past Performance**
 - **Experience w/ Similar Work**
 - **Proposed Technical Approach/Solutions**
 - **Management Organization**
 - **Proposed Schedule**
 - **Technical Experience and Expertise**
 - **Key Personnel Qualifications**
 - **Small Business Subcontracting Plan**
 - **Price (but remember, its not Sealed Bidding)**



The Questions...

There are lots of good reasons for entering into teaming agreements

- **How do I get into Federal Contracting if I Have Not Done Federal Work Before?**
- **How do I, as a “small” business, get “big” (i.e. high dollar, high complexity) contract experience?**
- **How do I, as a “large” business concern, take advantage of the increasing number of “small” business program set- aside contracts?**

(Remember that teaming is not a tough sell to large concerns – they have a lot to gain too. Big businesses want access to small business set-aside contracts. They need your small business program eligibility. Small businesses therefore have a decent amount of negotiating power when it comes to teaming arrangements)



The Answer: TEAMING



Some Benefits of Teaming

1. Merge Skills and Assets
2. Leverage Capabilities to Provide Client with Best Value
3. Strengthen Important Evaluation Factors or “Discriminators” (Large Concern Helps Small Business) to Maximize “Best Value”
 - Technical Expertise
 - Past Performance
 - Experience
 - Customer Knowledge
 - Cost Performance
4. Small Business Contracting Advantages (Small Business Helps Large Concern)



IS TEAMING RIGHT FOR YOU?



Is Teaming Right for You?

- What are your Company's Goals?
- What are your Company's Strengths and Weaknesses?
- Is the Company capable of functioning as a Prime? / Would the "discriminators" discussed earlier weigh more heavily in your favor with a teammate?
 - *Large Businesses often have the Technical Expertise, Experience, and Key Personnel that Source Selection Teams are looking for*
- What effect will teaming have on my small business/WOSB status?
 - *When done correctly (discussed later), teaming should not negatively impact your status.*
 - *Essential that you strike a balance between strengthening your "discriminators" through reliance on teammate, and self-performance*



Who Should You Team With?

- **What type of business arrangement is appropriate and why?**
 - *Joint Venturing v. Teaming*
- **What's the relationship between the parties?**
 - *For small businesses, remember that your small business status provides negotiating power*
- **What's the endgame?**

ESSENTIAL PROVISIONS & KEY CONSIDERATIONS



Essential Provisions

- **Relationship of the Parties (Roles and Responsibilities)**
- **Exclusivity**
- **Awarding a Subcontract/Flow Down Provisions**
- **Communications with Client**
- **Protection of Proprietary Information/Non-Disclosure Agreements**
- **Term and Termination**
- **Governing Law**
- **Limitation of Liability**
- **Disputes and Resolution Process**
- **Non Solicitation of Employees**



Critical Considerations

- **Destroying “Small” Size Status or Otherwise Nullifying Small Business Program Eligibility.**
- **How? Two common ways:**
 - **“Affiliation”**
 - **Work Percentage Requirements**

You have to draft your Teaming Agreement to Address and Overcome these Concerns!



“AFFILIATION”

What Can Go Wrong?

- Concerns are “Affiliates” when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. (13 CFR 121.103)
- General Affiliation -- A large/non-disadvantaged business is too closely related to, or intertwined with, the small disadvantaged business on a large scale basis.
- “Ostensible Subcontractor” -- A large/non-disadvantaged business has excessive “control” or the power to control a small business concern on a particular procurement.



“AFFILIATION”

The Test the SBA will Apply Includes:

- The Totality of the Circumstances
- Clear Line of Fracture
- Identity of Interest
- Newly Organized Concern
- Control or power to Control
- Ownership, Management, Previous Relationships
- Affirmative or Negative Control



“AFFILIATION”

Examples of Affiliation

- Common Ownership
- Family Relationship
- Common Management
- Common Location
- Sharing Key Employees
- Bonding Indemnification – NOT per se “Affiliation”
 - *SBA has consistently held that bonding assistance alone does not prove that a large firm and a small firm are affiliates, but it can support a finding of affiliation in connection with other indicia of affiliation.*

“AFFILIATION”

How to Combat “Affiliation”

Teaming partners can avoid “affiliation” determination by entering into arms-length transaction.

(Note: Joint Ventures are presumed to be affiliated with each other, except when they form an SBA-approved Joint Venture.)



Work Percentage Requirements

SBA Regulations are Very Specific about the Percentages of Work the Prime Contractor must Self Perform.



Work Percentage Requirements

§ 125.6 Prime contractor performance requirements (limitations on subcontracting).

- (a) In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, a WOSB or EDWOSB contract pursuant to part 127 of this chapter, or an unrestricted procurement where a concern has claimed a 10 percent small disadvantaged business (SDB) price evaluation preference, a small business concern must agree that:
 - (1) In the case of a contract for services (except construction), the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees.
 - (2) In the case of a contract for supplies or products (other than procurement from a non-manufacturer in such supplies or products), the concern will perform at least 50 percent of the cost of manufacturing the supplies or products (not including the costs of materials).
 - (3) In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials).
 - (4) In the case of a contract for construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials).



Work Percentage Requirements

CAREFUL! Note how the percentages are calculated:

Contractors often think that the percentage requirements relate to the **WHOLE CONTRACT PRICE**. They don't. (At least not yet).

For example:

- In the case of a contract for general construction, the concern will perform at least 15 percent of the cost of the contract with its own employees (not including the costs of materials).
- In the case of a contract for construction by special trade contractors, the concern will perform at least 25 percent of the cost of the contract with its own employees (not including the cost of materials).



Work Percentage Requirements

Each Small Business Program Has its Own Work Percentage Requirements

- **HUBZone**
 - 13 CFR § 125.6 (c) and 13 CFR § 126.600
- **VOSB/SDVOSB**
 - 13 CFR § 125.6 (b)
- **WOSB/EDWOSB**
 - 13 CFR § 125.6 (a)



Work Percentage Requirements

How to Combat Potential Problems with Work Percentage Requirements

- Prime Contractor and Subcontractor roles are generally defined in teaming agreement provisions.
- Make sure Prime Contractor scope of work is appropriately, and very specifically, defined.
- Explicitly state percentage of work (be sure to use the right calculation) to be performed by each party in teaming agreement provisions.

PROTECTING YOUR INTERESTS



PROTECTING YOUR INTERESTS

There is no “I” in
Team...

...but there is a “ME””

Learning how to advocate for yourself
with respect to key provisions is critical

Some examples:



Definition of Subcontractor's Work

Pro-Prime Teaming Agreement

- **Conditional, subject to Customer instructions, applicable laws, additional team members, etc.**

Pro-Sub Teaming Agreement

- **Specifically set forth the SOW (specify percentage of work awarded and specific tasks or functions)**

Prime's Commitment to Sub

Pro-Prime Teaming Agreement

- Reasonable best efforts to secure Customer's approval
- Subject to Customer's approval
- Prime may bring in additional team members
- Adjustments to Sub's Portion of Contract effort

Pro-Sub Teaming Agreement

- Prime shall propose Sub
- Recognizes Sub's contribution
- Prime shall award Subcontract unless Customer objects in writing
- No Adjustment to Sub's portion of Contract effort without Sub's consent



Subcontract

Pro-Prime Teaming Agreement

- Shall use best efforts to negotiate a subcontract or Sub required to accept Subcontract in attached form
- Modification of Sub's work permitted in Subcontract or Task Orders
- Prime given liberty to award subcontracts to other companies if Subcontract not signed within X days
- Liquidated damages payable by Sub for failure to conclude Subcontract

Pro-Sub Teaming Agreement

- Prime shall award Subcontract in attached form
- No modifications of Sub's work without Sub's consent
- No Prime Commitments which adversely affects Sub's technical or cost proposal
- Prime obligated to award Subcontract unless Customer expressly objects in writing
- No other "out" for the Prime



Payment Terms

Pro-Prime Teaming Agreement

- Sub paid after Prime paid (commonly referred to as “pay when paid” clause)

Pro-Sub Teaming Agreement

- Specific payment terms (labor rates, ODCs, overhead, G&A and profit if cost reimbursement)



Control over Customer Relationship

Pro-Prime Teaming Agreement

- Prime to decide on all communications to Customer
- Sub not to communicate to Customer
- Sub not to make press releases
- Prime controls bid protest / all litigation decisions

Pro-Sub Teaming Agreement

- Participate in project meetings/presentations



Limitations on Liability

Pro-Prime Teaming Agreement

- Liability of Prime to Sub is limited to the extent to which Owner is liable to Prime
- All damages recoverable by Sub from Prime are limited to damages recoverable by Prime from Owner
- Sub indemnifies Prime and Owner

Pro-Sub Teaming Agreement

- Limiting liability to sub's negligence
- Damages not limited to those recoverable from Owner



RECENT DEVELOPMENTS



RECENT DEVELOPMENTS

ENFORCEABILITY OF GENERIC TEAMING AGREEMENTS

Recent Decision in *Cyberlock Consulting, Inc. v. Info. Experts, Inc.* (E.D.Va 2013)

- The Court held that a teaming agreement expressing that the parties would negotiate a subcontract in the future was just an “agreement to agree” and thus unenforceable.
- In *Cyberlock*, subcontractor on contract with U.S. Office of Personnel Management (“OPM”) could not require prime, its teaming partner, to award a subcontract providing Cyberlock 49 percent of the work.
- The *Cyberlock* decision confirms government contractors cannot rely on generic teaming agreements promising work under a future subcontract.
- Instead they need to negotiate more definite subcontract terms and conditions that will result in a prime contract award.
- Another potential solution? Attach a draft subcontract to the Teaming Agreement as an attachment.



RECENT DEVELOPMENTS

CHANGES TO PERCENTAGE OF WORK REQUIREMENTS

National Defense Authorization Act of 2013 (“NDAA”)

- Directs SBA to change the applicable regulations with respect to the percentage of work requirements for certain of the SBA small business programs. (See National Defense Authorization Act of 2013, H.R. 4310 (112th) § 1651).
- The NDAA changes the manner in which the SBA may calculate percentage of work requirements with regard to non-construction service and supply contracts, and potentially construction contracts as well.
- Switch to “Total Contract Cost” calculation?
- Stay informed of changes!



RECENT DEVELOPMENTS

CHANGES TO THE MENTOR-PROTÉGÉ PROGRAMS

National Defense Authorization Act of 2013 ("NDAA")

- **NDAA also makes changes to the Mentor-Protégé programs**
 - Currently there is an 8(a) Mentor-Protégé Program; no others
 - SBA is to establish Mentor-Protégé Programs for the other Small Business Programs, including the WOSB/EDWOSB Program
 - Shall be modeled on the 8(a) Program
 - No clear timeline, but the SBA has promised it is a priority
- **How will it effect Joint Ventures, if at all? Will that change the cost/benefit analysis regarding Joint Ventures v. Teaming Agreements?**



SBA OCTOBER 2, 2013 FINAL RULE (78 FED. REG. 61114)

- Revised Regulations implement changes required by the Small Business Jobs Act of 2010.
- This revision is an attempt to stop the negative effects of “bundling” on small businesses. (See 13 C.F.R. § 125.2(d)).
- New rule will permit small businesses to form Small Business Teaming Arrangements (“SBTAs”) which can compete for bundled contracts without running afoul of SBA’s size and affiliation rules.



SBA OCTOBER 2, 2013 FINAL RULE (78 FED. REG. 61114)

- According to new regulations, an SBTA is defined as “[t]wo or more small business concerns...formed [as] a joint venture to act as a potential prime contractor.” (13 C.F.R. § 125.1(u)(1)).
- Moreover, “[a] potential small business prime contractor [may] agree[] with one or more other small business concerns to have them act as its subcontractors under a specified government contract. (13 C.F.R. § 125.1(u)(2)).
- The only requirement for SBTAs are:
 - The agreement must be in writing; and
 - All team members must be categorized as “small” per the applicable size standard.



QUESTIONS?



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Give Me 5

- National program from WIPP & American Express OPEN designed to educate women business owners on how to apply for and secure federal procurement opportunities.
- Give Me 5 works to increase the representation of Women Business Owners that win government contracts. We provide accessible business education tools to assist both new and experienced federal contractors.
- Women Business Owners could gain more than \$4 billion in annual revenues if the 5% contracting goal set by Congress was reached.



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GIVE ME FIVE
5%

