



Legal and Regulatory Foundations for Teaming

Hargrove & Rea, P.C.

SOCIETY OF AMERICAN MILITARY ENGINEERS

**2nd Annual Post Small Business Conference
(with participation by AFCEE and 311HSW/SB)**

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Legal and Regulatory Foundations for Teaming

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- What is Teaming and Why do it?
- With Whom to Team
- Types of Agreements
- SBA Considerations

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Why Team?

- Response to changes in the way FedGov buys goods and services
- Reduction in Acquisition Workforce has led to fewer contracts
- Yet, contract requirements are becoming more complex

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Why Team?

- Maximize complementary skills, resources, and capabilities
- Minimize risks
- Develop a direct relationship with DoD
- Fill gaps in past performance
- Eliminate barriers
- Increase competitiveness
- Allows Small Business to join together and form a much larger entity while still receiving the advantages of being treated as Small Business

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Definition

- An arrangement under which two or more entities combine their talents in the pursuit of business opportunities and the performance of contracts

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 act as its subcontracts under a specified government contract or acquisition program.

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FAR will recognize teaming arrangements

FAR 9.603 Policy

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.

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FAR 9.604 Limitations

Nothing in this subpart authorizes contractor team arrangements in violation of antitrust statutes or limits the Government's rights to—

- (a) Require consent to subcontracts (see Subpart 44.2);
- (b) Determine, on the basis of the stated contractor team arrangement, the responsibility of the prime contractor (see Subpart 9.1);
- (c) Provide to the prime contractor data rights owned or controlled by the Government;
- (d) Pursue its policies on competitive contracting, subcontracting, and component breakout after initial production or at any other time; and
- (e) Hold the prime contractor fully responsible for contract performance, regardless of any team arrangement between the prime contractor and its subcontractors.

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Why Team?

Alternatives to Keep in Mind...

- Can you do the work in-house?
- Can you develop your capabilities?
- Can the gaps be filled by hiring, purchasing, expanding, etc.?

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With Whom to Team

- Due Diligence
- Identify Issues
- Gather Information
- Analyze Carefully
- Don't Rush.
- Past Performance -- Critical

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Teaming Agreements:

Difference between Teaming Agreement and Subcontract

- Teaming Agreement focuses on procurement of work
 - Proposal preparation responsibilities
 - Division of work responsibilities in the event the team wins an award
 - Good faith understanding that the parties will negotiate a subcontract
- Subcontract focuses on:
 - SOW
 - Pricing
 - Terms of Performance
 - Flowdown clauses
 - Dispute resolution

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Teaming Agreements:

Differences between Teaming Agreement and Subcontract

- **One is for the Work**
- **One is for the Work to get the Work**
- **Subcontract is definitely enforceable, but not so with a Teaming Agreement**

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Teaming Agreements:

Essential Terms:

- **Definitions**
 - **Specify the RFP**
 - **Specify the parties**

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Teaming Agreements:

Essential Terms:

- **Allocation of Responsibility**
 - **Should be precisely drafted**
 - **Who prepares what?**
 - **What does Sub get if contract is awarded?**

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Teaming Agreements:

Essential Terms:

- **Statement of Work (for the Proposal)**
 - **Specify precisely what elements of the procurement process each will do, from start to finish.**

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Teaming Agreements:

Essential Terms:

- **Preparation of Proposals**
 - **Make sure, as Sub, you get access to RFP**
 - **Make sure the eventual proposal incorporates your submission**
 - **Communication with Gov**

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Teaming Agreements:

Essential Terms:

- **What Does Sub Get?**
 - **As Sub, make sure it is precise**
 - **Avoid fuzzy language like “goals,” “possible objectives,” “present intent.”**

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Teaming Agreements:

Essential Terms:

- **Obligation to Negotiate the Subcontract**
 - Language requiring “good faith” negotiations
 - Agreements to Agree are not enforceable
 - Price
 - Description of Work to be Performed
 - Time for performance
 - Time for payment
 - Mandatory flowdowns will be included

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Teaming Agreements:

Essential Terms:

- **Attach the Proposed Subcontract**

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Teaming Agreements:

Essential Terms:

- **Exclusivity**

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Teaming Agreements:

Essential Terms:

- **Solicitation**
- **Protection of Proprietary Info**

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Teaming Agreements:

Essential Terms:

- **General Boilerplate**
 - **Limitation on Damages**
 - **Dispute Provisions**
 - **No oral modification**
 - **No assignment w/out consent**
 - **Notice provisions**
 - **Indemnification**
 - **Choice of Forum / Choice of Law**

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Teaming Agreements:

Difference between Teaming Agreement and Subcontract

- Identify Parties
- Recitals
- Definitions
- Proposal Activities
- Nondisclosures
- Award of Contract
- Interaction with Customer
- Proprietary information / IP
- Termination
- Exclusivity

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Joint Ventures:



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Joint Ventures:

- How Does SBA Define Joint Venture:
- 13 CFR 121.103(h)
- A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, **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. **This means that the joint venture entity cannot submit more than three offers over a two year period**, starting from the date of the submission of the first offer. **A joint venture may or may not be in the form of a separate legal entity**. The joint venture is viewed as a business entity in determining power to control its management. SBA may also determine that the relationship between a prime contractor and its subcontractor is a joint venture, and that affiliation between the two exists, pursuant to paragraph (h)(4) of this section.

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Joint Ventures:

- How Does FAR Define Joint Venture:
- FAR 19.101(7)(i): A joint venture for size determination purposes is an association of persons or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in any carry out a single specific business venture for joint profit, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally. A joint venture is viewed as a business entity in determining power to control its management.

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Joint Ventures

Elements of Agreement:

- Ownership
- Contract to Be Sought
- Executive Committee
- Project Manager
- Financing
- Office
- Equipment
- Liabilities and Expenses
- Other General Legal Terms

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Joint Ventures

vs.

Teaming Agreement

- Do you want to be Prime?
- Do you want to be Sub? (less risk)
- Expense involved in setting up Joint Venture.

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SBA Issues

- Affiliation
- Performance of Work Requirements
- Ostensible Subcontractor Rule

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SBA Issues

Affiliation:

- 13 CFR 121.103(a)
 - (1) Concerns and entities are affiliates of each other **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. It does not matter whether control is exercised, so long as the power to control exists.
 - (2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

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Affiliation:

- Arm's Length Teaming Agreement
 - may avoid affiliation
- Joint Venture
 - presumed to be affiliated
 - one BIG exception....

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SBA Issues

Affiliation:

- **MENTOR / PROTÉGÉ JV**
- Purpose:
 - Encourage approved mentors to provide assistance to eligible 8(a) firms
 - Serve as a developmental tool to 8(a) firms
 - Enhance the capabilities of protégé

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SBA Issues

Affiliation:

- Mentor Requirements:
 - Transitional Stage 8(a) firm, graduate, small business, or large business
 - Possess favorable financial health
 - Possess good character
 - Can impart value to protégé
 - Demonstrate ability to assist protégé
 - Commit to provide assistance
 - Not debarred or suspended

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SBA Issues

Affiliation:

- **PROTÉGÉ Requirements:**
 - 8(a) firm in Developmental Stage, or
 - Never received an 8(a) contract, or
 - Less than half the size standard of primary NAICS
 - In good standing

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SBA Issues

Affiliation:

- Benefits of MP Program
 - Affiliation and Work-Requirement Exclusions
 - Numerous other inherent benefits

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SBA Issues

Performance of Work Requirements:

- General Rule:
 - Specifies per cent of contract work that must be performed by the small business prime contractor.
 - Set out in FAR clause 52.219-14 “Limitations on Subcontracting” and 13 CFR 125.6
- Can Pose Problems Trying to Allocate Work

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SBA Issues

Performance of Work Requirements:

- Work-Requirement re: Mentor/Protege
- EXAMPLE
 - MENTOR, INC. does 49% of work
 - PROTÉGÉ, INC. does 51% of work
 - As a Joint Venture, however, the are collectively Prime. Thus the JV can subcontract 50% of the work to subs.
 - At the end of the day, PROTÉGÉ, INC. has participated in an 8(a) project at the Prime-Level only having done 25.5% of work.

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SBA Issues

Ostensible Subcontractor Rule:

- General Rule:
 - A prime contractor will be considered an affiliate of its subcontractors that perform primary and vital requirements of the contract and subcontracts upon which the prime contractor is unusually reliant.

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SBA Issues

Smalls Banding Together:

- Affiliation Exclusions
- Two or More Smalls may form JV without regard to affiliation if:
 - the procurement is “bundled”, or
 - even if not “bundled,”
 - for receipt based sized standards, the dollar value of procurement exceeds half the size standard or
 - for employee based size standards, the dollar value is greater than \$10mill.

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SBA Issues

Smalls Banding Together:

- Performance of Work Exclusions
 - 13 CFR 125.6(h)(i): Where an offeror is exempt from affiliation under §121.103(h)(3) (relaxed affiliation rules) of this chapter and qualifies as a small business concern, **the performance of work requirements set forth in this section apply to the cooperative effort of the joint venture, not its individual members.**



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