

**Teaming Arrangements:
Your Force Multiplier for
Government Contracting Success**

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Agenda

- Introduction
- Overview of Teaming Arrangements
- Government Recognition of Teaming Arrangements
- Enforceability of Teaming Arrangements
- Strategies for Primes and Subs
- Questions

The Context

- Contractors focus on core competencies in tough times, leading to specialization
- As technology gets more complex, so do government contract solicitations
- Congress continues to press for meaningful small business participation in federal contracts
- Teaming Arrangements are a proven way to address these tensions

What is a “Teaming Arrangement”?

“Two or more companies form a ***partnership or joint venture*** to act as a potential prime contractor; or . . . [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.”

FAR § 9.601

What is a “Teaming Arrangement”?

- Common way to combine resources to compete for a contract without creating a new business entity
- Teaming may be an appropriate strategy in state & local procurements as well
 - Generally no formal state contracting rules
 - Reliance on state law contracting principles
 - Prime-Sub and JV arrangements may work

Why enter into Teaming Arrangement?

- Compete for a contract requiring technical, financial or other capabilities you don't have
- Beef up your past performance scores
- Meet small businesses contracting requirement
- Ensure partner has required technical, financial, and past performance history
- “Lock in” a proposal team member
- NOT to suppress competition!

Common Documents in a Teaming Arrangement

- Non-disclosure Agreement
- Letter of Intent
- Exchange of “due diligence” material
- Teaming Agreement
- Subcontract
- Joint Venture Agreement

Proprietary Data Nondisclosure Agreements

- Agreement defining proprietary data and the limits on its use by the parties and disclosure to third parties.
- Protect data without fear of losing trade secret protection or risking public disclosure
- Relationship building
- Planning & preparing proposal
- **GENERALLY AN ENFORCEABLE CONTRACT**

Letters of Intent

- Define responsibilities leading up to signing of the teaming agreement
- What steps each of the parties will take
- What role each will play
- Establish procedures for information exchange and discussions regarding capabilities
- **GENERALLY NOT AN ENFORCEABLE CONTRACT**

Subcontract v. Joint Venture

“Subcontract” is any contract to furnish supplies or services for performance of a prime contract or a subcontract.

“Joint Venture” is an agreement to combine resources to pursue a business venture and share the profits, akin to a partnership.

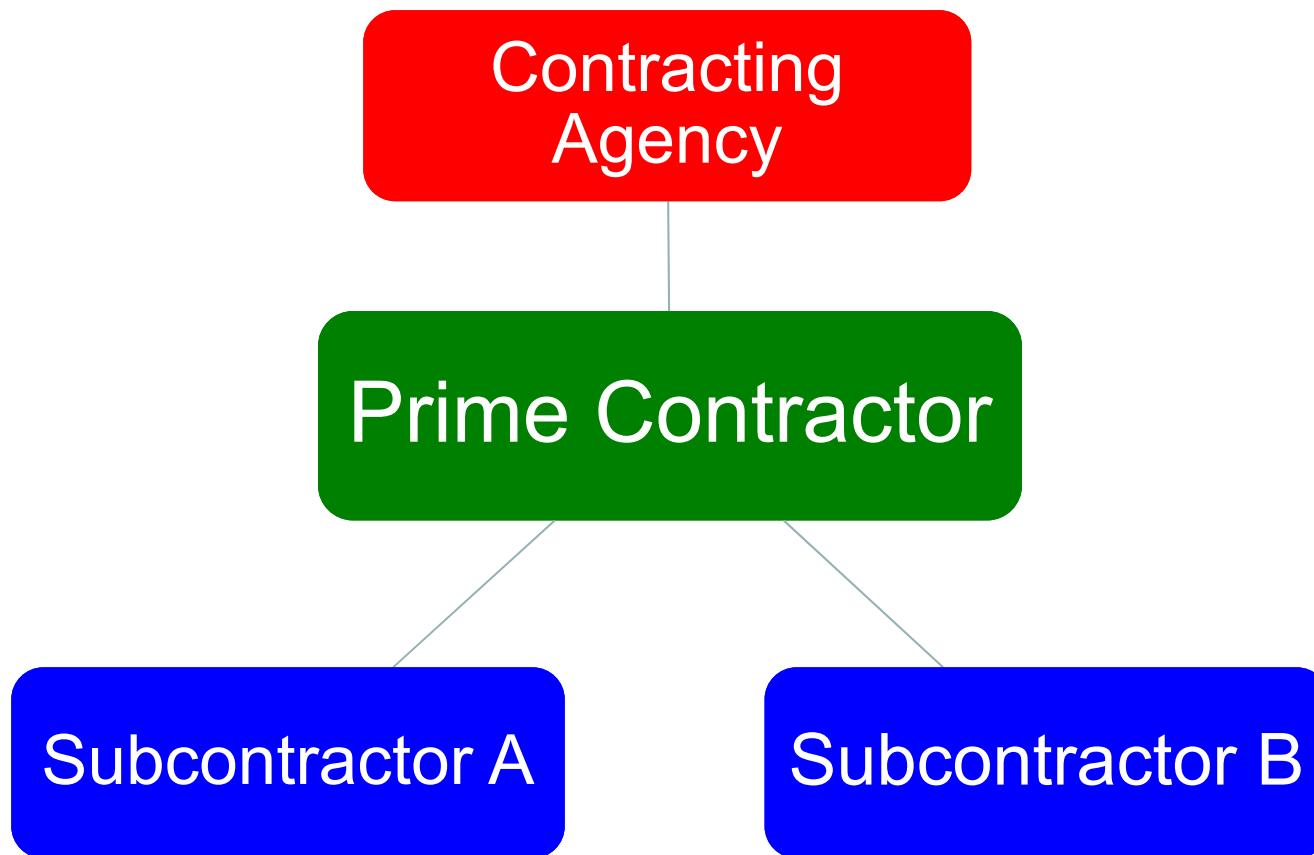
Joint Ventures

An association of concerns with interests in proportion consorting to engage in and carry out ***no more than three . . .*** business ventures for joint profit ***over a two year period***, for which . . . they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally.

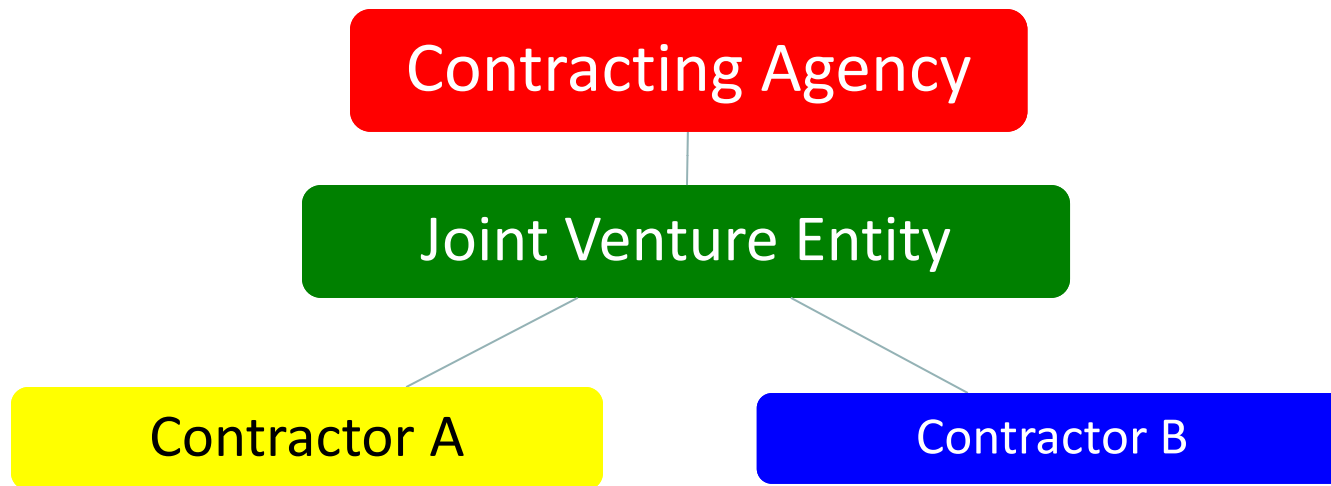
Joint Ventures

This means that ***a specific joint venture entity generally may not be awarded more than three contracts over a two year period . . .*** without the partners to the joint venture being deemed affiliated for all purposes.

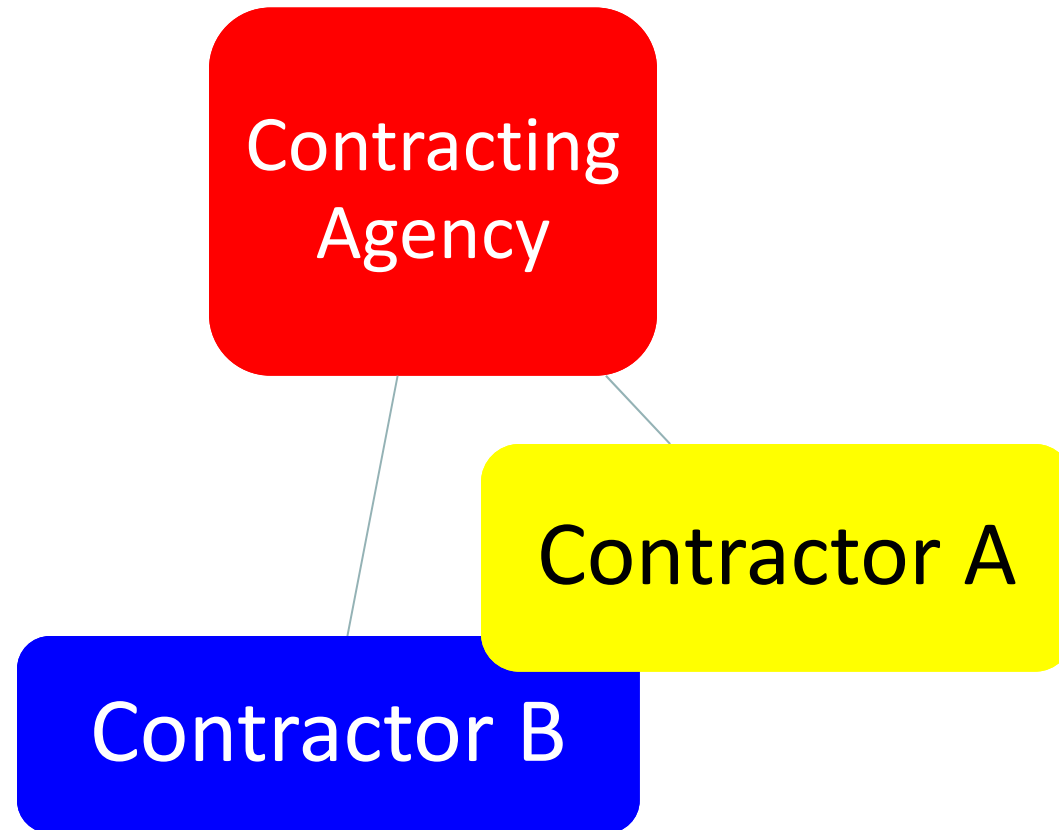
Prime – Sub Teaming Arrangement



JV as Separate Legal Entity



Unpopulated JV Arrangement



Brooks Range Contract Serv., CoFC (2012)

- Bid protest of GSA building management contract
- Protestor claimed:
 - Awardee's CTA was a JV under Georgia law
 - Award to JV w/o GSA contract not allowed
- CoFC denied protest & stated (in *dicta*):
 - Each member must have schedule contract
 - Awardee had proper "Contractor Teaming Agreement" under solicitation & GSA guidance
 - Agency not required to do state law JV analysis

Teaming Agreements

- Common elements:
 - **Recitations** of parties' skills, experience and backgrounds
 - The nature of the procurement involved
 - Express **limitation** on the scope of the agreement – e.g., not intended to be a formal joint venture or partnership
 - **Description** of the work each party will be responsible for during proposal preparation and performance
 - Term, **exclusivity** and **termination**, if appropriate
 - **Process for awarding – or negotiating – a subcontract**

Government Recognition of Teaming 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.”

FAR § 9.603

Recognition of Teaming Arrangements

- *Burns & Roe Services Corp., B-291530, (2004)*
 - Best value base operations procurement
 - Team 1: \$92.1 million, “Good (minus)”
 - Team 2: \$92.2 million, “Good”
 - Debrief: “Minus” = failure to meet small biz goals
 - GAO: Navy unreasonably failed to consider Team 1 small biz team member – requiring re-solicitation
- Teaming can ***win*** small business procurements

Recognition of Teaming Arrangements

- *Nova Technologies*, B-405982.2 (2012)
 - SDVOSB set-aside for US Air Force mission planning
 - USAF sought “substantial confidence” in past performance
 - Awardee ***\$100 million less*** than Nova
- Protestor alleged that Nova USAF should not have “substantial confidence” in awardee
- GAO denied protest: USAF properly considered past performance of large business “key subcontractor”
- Teaming can help **win** past performance points

Government Recognition of Teaming Arrangements

- Only prime contractors have *privity* with the government
- Government reservation of rights:
 - Require consent to subcontracts
 - Determine the responsibility of the prime contractor on the basis of the stated teaming arrangement
 - Enforce policy on competitive subcontracting at any time during contract performance
 - Look to the prime contractor as the party fully responsible for contract performance, notwithstanding any teaming arrangement

FAR § 9.604

Enforceability of Teaming Agreements

- A contract is, “a mutually binding legal relationship obligating the seller to furnish the supplies or services ... and the buyer to pay for them.” FAR § 2.101
- A “meeting of the minds” on the basic terms of the contract:
 - Price
 - Subject matter
 - Delivery Schedule

Enforceability of Teaming Agreements

- Teaming agreements generally not intended to be a binding contract between the parties.
 - Often forward looking & general
 - No specific agreement on price
- Druar v. Ellerbee & Co., 24 N.W. 2d 820 (1946)
 - Discussions and plans to pursue military construction contracts unenforceable
 - No specific division of work or profits

Enforceability of Teaming Agreements

- Teaming agreements may be construed as a binding contract between the parties
- Contract formation in Virginia requires:
 - (1) scope of the work to be performed
 - (2) the compensation to be paid
 - (3) the terms of the agreement = Intent to enter into a contract
- EG&G Technical Services v. Cube Corporation, Fairfax County, VA
 - small business prime bound to contract with large sub for Navy baseops contract

Enforceability of Teaming Agreements

- Terms showing intent to form a contract:
 - Express statements that party will be awarded subcontract if other party wins the prime contract;
 - Specific divisions of the work, especially if in percentages or elements of work;
 - Specific provisions on price of the work performed by the subcontracting member;
 - Detailed terms and conditions, especially if related to the expected prime contract

Enforceability of Teaming Agreements

- Terms showing lack of intent to contract:
 - Explicit statements that the teaming agreement is not a binding contract;
 - General descriptions on division of work;
 - Absence of detail; use of general principles to guide negotiation
 - “Agreements to agree” are usually worthless to a prospective subcontractor

Subcontractors Getting “Stiffed”?

- Recent survey of 740 subcontractors found that 1/3 were left out of contract performance
- Subcontractors helped prepare bids and were named in proposals to agencies
- IT and professional services subcontractors get left out more often (40% and 63%)
- 22% of subcontractors received work on recommendation of primes

Small Business Jobs Act of 2010

- Section 1322 – Good faith effort to use subcontractors named in bids and proposals
- Section 1341 – Deemed knowing certification and presumed loss rule

Small Business Jobs Act

Section 1322 Rules

- Offeror will make “**good faith effort**” to acquire supplies, services, materials from small business “**used in preparing** and submitting” bid or proposal
- Offeror will “provide to the contracting officer a **written explanation** if the offeror or bidder fails” to acquire supplies, services, materials from small business “used in preparing and submitting” bid or proposal

Small Business Jobs Act

Section 1322 Proposed Rules

- A prime contractor **“uses”** a subcontractor in preparing its bid if:
 - Proposal or bid references small business, or
 - Offeror has subcontract or agreement in principle to use subcontractor for portion of specific contract, or
 - Small business drafted part of proposal or offeror used small business cost/pricing or technical expertise, and
 - There is “an intent or understanding that SBC will be awarded a subcontract...”

Small Business Jobs Act

Section 1322 Proposed Rules

- Does not change substantive state law:
 - subcontract formation governed by state law
“meeting of of the minds” – objective test
 - “Good faith effort” alone does not force prime to use subcontractor unless there is agreement on all elements of subcontract
- In SBA’s eyes “good faith effort” may require use of subcontractor at stated price

Small Business Jobs Act

Section 1322

- Small Business Strategy:
 - Get named in the proposal
 - Draft part of proposal
- If not awarded subcontract “FOIA” prime’s “written explanation” to contracting officer
- Contact contracting officer and/or the agency inspector general
- Government reserves right to approve subcontractors!

Small Business Jobs Act

Section 1322

- Large Business Strategy:
 - Clear agreement that no subcontract is guaranteed
 - Don't mention sub – unless you have to
- Include valid business reason in written explanation to contracting officer
- Avoid doing work in house/using large business subcontractor
- Respond truthfully and completely to questions from contracting officer

SB Issues: Staying Small

- NAICS Code & Size Determination:
 - 3 year average employees: 500, 750, 1000
 - 3 year average gross revenue: \$7, \$14, \$33.5
- SBA applies complex “Affiliation Rules” to ensure that only small businesses are awarded contracts intended for small businesses

SB Issues: Staying Small

General Rules of Affiliation

Concerns and entities are affiliates of each other when one controls or has the power to control the other, or 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.

13 CFR §121.103(a)

Joint Ventures

- Businesses are “affiliated and treated as one business” where one can control another
- Joint Venture members are “affiliated”
 - SB cannot form JV team with large business on a set aside contract
- SB may form JV team with another SB, depending on size of procurement
- SB may be prime to LB subcontractor if...

Ostensible Subcontractor Rule

- Rule is intended to prevent “pass through” of small business contracting opportunities to large businesses
- If there is a violation of the Ostensible Subcontractor Rule, the parties are deemed to be a joint venture for size determination purposes
- Once revenues or employees are combined, the joint venture is ineligible for a small business award

Ostensible Subcontractor Rule

- Subcontractor performs primary and vital requirements of a prime contract:
 - Prime contractor lacks ability to perform tasks
 - SB prime ***may bolster past performance*** with LB experience – but ***may not rely exclusively*** on it
- Prime contractor is unusually reliant on subcontractor:
 - Lack of prime experience & subcontractor incumbency
 - Agreement for Sub to formulate and submit proposal
 - Teaming Agreement that didn't separate tasks & duties

Ostensible Subcontractor Rule

- SBA considers all aspects of prime-sub relationship:
 - Terms of the proposal (contract management, technical responsibilities, and the percentage of subcontracted work)
 - Agreements between the prime and subcontractor (bonding assistance or teaming agreement)
 - Whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation
- Case by case determination:

“While previous ostensible subcontractor cases may be instructive, they are unlikely to be binding, for the facts and solicitations involved are usually unique.”

Size Appeal of Logmet, LLC - 2010

- USAF contract for aircraft maintenance @ McDill
- Protestor alleged ostensible subcontractor violation:
 - Habitual subcontracting relationship
 - TA gave 49% of work to sub, “indicative of JV”
- On appeal to SBA OHA: **Reversed:**
 - Contract had only one line item
 - Logmet could perform contract work
 - Subcontracting part of work (nightshift) is permissible management decision
 - Logmet had three past contracts as required by RFP

Size Appeal of CWU, Inc. - 2010

- DHS contract for LE officer training in Georgia
- SBA found ostensible subcontractor violation:
 - TA gave 49% of work to *incumbent* large sub
 - TA relied on sub personnel and did not specify sub's work or role of CWU in performance
 - Contract had multiple tasks; proposal did not allocate work, suggesting undue reliance
 - CWU relied on incumbent's past performance and management personnel

Small Business Jobs Act of 2010

Section 1341

- ***Contract*** or subcontract ***set aside*** or intended for small business concerns ***includes presumption of loss*** equal to amount spent on contract if a large business willfully sought and received award by misrepresentation
- ***Deemed*** affirmative, willful, ***intentional certifications*** of small business size and status:
 - ***Bid or proposal*** for set aside contract or subcontract
 - ***Registration*** in CCR, ORCA, etc.

Small Business Jobs Act

Section 1341 Proposed Rules

- Deemed affirmative, willful and intentional certifications:
 - Submission of bid or proposal for set-aside contract or subcontract
 - Submission of bid or proposal for contract or subcontract otherwise counted as small business award
 - Registration on electronic database – ORCA, CCR, VetBiz
- Presumption of Loss
 - Full contract Price
 - No Allowance for Delivered Goods/Services

Small Business Jobs Act

Section 1341 Proposed Rules

- Deemed certification & presumption are “*irrefutable*”
- BUT – Contractor can limit liability by showing:
 - Unintentional error/technical malfunction
 - Management procedures on representations
 - Unclear/ambiguous requirement
 - Efforts made to correct invalid certification
- What about violation of Ostensible Subcontractor Rule?

Profile of Subcontractor Teaming Partner

- Has technology or other capability required to make prime's proposal responsive
- Qualified small business
- Possesses critical past performance
- Experienced government contractor – knows and abides by the the rules

Profile of Prime Contractor Teaming Partner

- Has capability to compete for award – “go with the winner”
- Will commit to subcontract award
- Will accept mutual exclusivity provisions
- Reasonable termination provisions for long-term arrangements
- Respects and protects proprietary data

Questions?

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