

American Legion 2011 Annual Convention
Small Business Workshops

PROTORÆ LAW_{PLLC}

Teaming with Today's Business®

Teaming

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What is teaming?

- Contractor Team Arrangement
 - ✓ Defined in FAR 9.601
 - ✓ Different from GSA CTA
- Two types identified in FAR
 - ✓ Prime/Sub Contract
 - ✓ Joint Venture
- Mentor/Protégé Programs

Why team?

- Offer the Govt the best combination of performance, cost, and delivery for goods and services procured
- Increase competitive advantage by combining strengths and offsetting weaknesses
- Widen the net
- Subcontracting Plan requirements

How do you find Team members?

- Networking
- Mentor/Protégé Programs
- OSDBUs
- Prime Contractor events
- SBA/Association events

When should you form a Team?

- After an opportunity identified and before offer is submitted
- Govt will recognize the “integrity and validity” of contractor team arrangements provided that the arrangements are identified and company relationships are fully disclosed in offer submitted to Govt
- Can team after award, but consent likely required

How Do You Form A Team?

- Execute a Teaming Agreement
- Execute a Joint Venture Agreement
- Legal Document
- Must contain certain provisions to be enforceable
- Must contain certain provisions to be eligible for contract award

What does the *Prime* want from the *Sub* in a Teaming Agreement?

- Commitment to work on the proposal effort all the way through contract award
- Commitment to devote resources to proposal effort and to commit company personnel or goods for project
- Exclusivity
- Confidentiality/Nondisclosure
- Flexibility regarding subcontract award

What does the *Sub* want from the *Prime* in a Teaming Agreement?

- Commitment to identify subcontractor as a team member in the proposal
- Ability to review proposal sections regarding subcontractor's areas of responsibility prior to submission
- Ability to participate in all aspects of proposal process
- Exclusivity
- Confidentiality/Nondisclosure
- Commitment of a subcontract award, with certain provisions

What makes a Teaming Agreement enforceable?

- Must demonstrate the intention of the parties to be bound by its terms
- Must have agreement on “essential terms” that are sufficiently definite to enforce
 - ✓ Pricing, Workshare, Delivery Schedule
- Supported by “consideration”; can’t be agreement to agree
 - ✓ Commitment to award subcontract in exchange for assistance in proposal effort

What does the *Prime* want from the *Sub* in a Subcontract?

- Quality goods and/or services
 - ✓ Inspection Rights, Warranties
 - ✓ Performance Standards/Specs
- On time
 - ✓ Schedule
 - ✓ Time if of the Essence
 - ✓ Liquidated Damages
- No extra costs
 - ✓ Repair of Defective Work
 - ✓ Indemnifications

What does the *Sub* want from the *Prime* in a Subcontract?

- Getting work
 - ✓ Commitment re workshare, perform options
 - ✓ Participation in RFQ/RFP process under IDIQ
- Getting timely paid for work performed
 - ✓ Paid when paid v. paid if paid
 - ✓ Payment conditioned upon acceptance
 - ✓ Progress/milestone payments
- Minimizing liability for work performed
 - ✓ Warranties, Indemnifications
 - ✓ Limitation of Liability

Subcontracting – Special Considerations

- Limitations on Subcontracting
 - ✓ If awardee is a small business and a prime, limits exist on amount of work that may be subcontracted
 - ✓ Limits vary and depend on status of contractor and type of prime contract
 - ✓ Services; prime must perform 51% of the cost of labor

Subcontracting – Special Considerations

- If small business is the prime, possible “affiliation” with large business subcontractor
- “Affiliation” based on the “totality of the circumstances”
 - ✓ “ostensible subcontractor” rule – unusual reliance on sub
 - ✓ Large business *incumbent* as sub
 - ✓ Who is performing “primary and vital” aspects of prime contract?

Subcontracting v. Joint Ventures

- Subcontracts
 - ✓ Prime has “privity” w/ Govt; primary contact w/ Govt
 - ✓ Prime entirely responsible for contract performance
 - ✓ Subcontractor has less responsibility which means less risk and less liability
 - ✓ Subcontractor has less responsibility which means less control over success of project and less past performance credit

Subcontracting v. Joint Ventures

- Joint Ventures
 - ✓ Both parties have privity
 - ✓ Both parties on the hook for performance
 - ✓ Prime cedes control; sub gains control
 - ✓ Sub can get better past performance record

Characteristics of a Joint Venture

- Common control
- Common management
- Sharing of Profits and Losses
- Joint and Several Liability
- Separate legal entity
 - ✓ Partnership
 - ✓ LLC or Corporation
- Limited Duration
- Tax Benefits

Structuring a Joint Venture

- Partnership
 - ✓ Informal arrangement
 - ✓ Partnership
 - ✓ Joint and several liability

- LLC
 - ✓ Protection from liability like a corp
 - ✓ Flow through tax benefits like a partnership
 - ✓ More formal; requires capitalization; set up a separate entity

Structuring a Joint Venture

- Corporation
 - ✓ Most formal; meeting requirements, filing requirements
 - ✓ Corporate Tax
 - ✓ Protection from liability

- Issues
 - ✓ Populated v. Unpopulated
 - ✓ Taxes
 - ✓ Affiliation

Joint Venture Considerations

- Affiliation
 - ✓ Important for small business member
 - ✓ Generally size of both members aggregated; some exceptions
 - ✓ Special rules for 8(a) JVs
- Limitations on Subcontracting

Mentor/Protégé Programs

- Teaming of large experienced business with smaller less experienced business
 - ✓ Long-term relationship
 - ✓ Different types of assistance required
- Separate agency programs
 - ✓ Different Characteristics
 - ✓ Different Benefits
- SBA Section 8(a) Program
 - ✓ Only program offering exemption from affiliation
 - ✓ Allows mentor to have ownership interest in protege

Questions?