Joint Ventures—Teaming Up to Win

A joint venture is two or more companies coming together to form a new business entity capitalizing on each individual companies' capabilities and strengths. Updated Small Business Administration (SBA) rules have created new advantages to joint venturing that makes this form more attractive than ever for certain offerors on certain Federal procurements, and small businesses must aggressively establish teaming partners to stay competitive. Knowledge of this reality will enable your businesses to form strategic teaming relationships to secure more Federal government contracts.

I. UNDERSTANDING STRATEGY – Why Teaming Arrangements?

Recent Federal legislation curtails growing deficits and has increased pressure on Federal agencies to trim costs and budgets. Therefore, contract consolidation will cause contracts to become larger and more complex, while opportunities for small businesses to single-handedly complete contract tasks or meet all contract requirements may diminish.[i] Teaming may become a necessity to stay competitive in the Federal marketplace.

The Federal Acquisition Regulations (FAR), the rulebook Federal government agencies follow when contracting, acknowledges and implicitly encourages teaming arrangements.[ii] FAR states that team arrangements may be desirable from both a government and industry standpoint in order to enable companies to (1) complement each other's unique capabilities, and (2) offer the government the best combination of performance, cost, and delivery.[iii]

II. UTILIZING JOINT VENTURES TO ADVANTAGE

A joint venture (JV) is defined as a business association that is intended to last for a limited duration and for a specific purpose: "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 and 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."[iv]

Teaming arrangements enable companies to collectively fulfill contract requirements that they could not fulfill separately. Also, the government must consider a bidder's "past performance" in all procurements valued over $1,000,000, and teaming arrangements enable parties to overcome past performance issues. JV arrangements enable companies to:

- Spread risks of prime-contracting;
- Leverage their combined capital;
- Share in profits of the entire project;
- Develop direct relationships with the government agency contracting officials; and
- Offer bonding capacity of larger companies, if doing business as a small businesses.

Most importantly, as described further below, Federal regulations enable JV partners to bid for contracts that collectively or separately they might otherwise be ineligible for.

A. SMALL BUSINESSES CONTRACTS

Government sets aside certain contracting opportunities for business meeting established small business size requirements. Small business size standards are specific for each industry (typically as set forth in the North American Industry Classification System or NAICS) and establish ceilings on revenue and number of employees for a business to be considered a "small business" for procurement purposes. JV partners may compete for "set aside" small business contracts or contracts with small business participation requirements, even though the combined size of the JV parties exceeds the applicable small business size standard.

JV partners are generally deemed to be "affiliated" for purposes of small business size standards that may be set for a Federal contract.[v] That is, as affiliates, the revenues and number of employees of the JV partners must be combined in order to determine if the JV should be considered a "small business" for purposes of any small business participation requirements on a Federal contract.[vi] However, recent FAR changes allow three exceptions to the requirement that JVs should be deemed affiliated and their revenues and number of employees combined.[vii]

1. When each JV partner qualifies separately as a small business under the size standard that is set for the government contract, and the contract itself meets certain criteria, multiple small businesses may be able to compete collectively for contracts set aside for a small business that they would otherwise not be able to perform on their own separately because of the size or complexity of the contract.[viii]

2. Another exception to the general affiliation rule applies to JVs that compete for a contract that is set aside for businesses that participate in the SBA's 8(a) Business Development Program (8(a) Program). The 8(a) Program provides business development services for small businesses that are owned and controlled at least 51% by socially and economically disadvantaged individuals. Under the exception for 8(a) JVs, all of the members of the JV must each satisfy the small business size standard for the contract, with at least one business being a participant in the 8(a) Program.[ix] This exception enables small businesses that do not participate in the 8(a) Program to nevertheless compete for 8(a) set aside contracts.

3. A third exception to affiliation applies to JVs that consist of companies approved by the SBA to be mentors and protégé's under the SBA's Mentor Protégé Program. The SBA's Mentor-Protégé Program, offered under the 8(a) Program, enables 8(a) participants to obtain technical and management assistance, financial assistance, and prime contracting opportunities from approved "mentors," which themselves do not have to be small businesses or owned by socially or economically disadvantaged individuals. For the Mentor-Protégé JV exception to apply, the 8(a) participant/protégé must qualify as a small business under the small business size standard set for the procurement and, for purposes of any 8(a) sole source requirements, must not have exceeded the limit on prior contract awards applicable to 8(a) sole source contracts.[x] The mentor, on the other hand, can be a large business. This program allows a large business to compete for a Federal government contract that is set aside for small businesses.

Teaming partners that wish to work under 8(a) contracts should plan the structure of the JV carefully because this will necessarily impact how work is shared and profits allocated. SBA regulations require that if the JV is a separate legal entity, the 8(a) partner must receive profits commensurate with its ownership interest (at least 51%), but if the JV is not a separate legal entity, the 8(a) participant must receive profits commensurate with its share of work (at least 40%).[xi]

The SBA rules advantageously increased the number of bids that JVs can submit. Previously, JVs were allowed **to submit** only three contract offers over a two-year period. Small businesses with combined sizes that exceeded size standards that wished to take advantage of one of the three affiliation exceptions were forced to carefully pick and choose the small business contracts they wished to bid for as a JV. Now, the SBA regulation effectively limits the number of contracts that a JV can **be awarded** to three over a two-year period.[xii] Unsuccessful bids no longer count. In addition, the amended SBA regulation allows the same JV partners awarded three contracts to form a second JV, which is then eligible to be awarded and perform three new contracts. At some point a repeated JV relationship will lead to a finding that the JV partners are affiliated, but when is unclear.[xiii]

B. SMALL DISADVANTAGED BUSINESSES

Under certain conditions, a JV may be able to enjoy benefits typically enjoyed by businesses certified as small disadvantaged businesses (SDBs) by the SBA, such as price evaluations, evaluation factors and subfactors, and monetary subcontracting incentives. To qualify as an SDB, at least one of the JV partners must be SDB-certified by the SBA. In addition, the SDB partner must be the manager of the JV and the employee of the SDB must be the project manager responsible for contract performance.[xiv]

C. SDVOSB CONTRACTS

JVs may also compete for contracts set aside for businesses that participate in the SBA's Service-Disabled Veteran-Owned Small Business Concern Program. The JV must include at least one service-disabled veteran-owned small business concern (SDVOSB) and all JV partners must qualify as a small business under any applicable size standards for the contract. Once again, the JV agreement must designate the SDVOSB as the managing venture and an employee of the managing venture must be designated as the project manager responsible for the performance of the contract. The JV must also state that not less than 51% of the net profits of the JV will be distributed to the SDVOSB.[xv]

D. WOSB AND EDWOSB CONTRACTS

In October 2010, the SBA published regulations pushing the government to meet its goal of awarding 5% of all contracting dollars to women-owned small businesses (WOSBs). The SBA regulation authorized agencies to set aside contracts for WOSBs and a subcategory - economically disadvantaged women-owned small businesses (EDWOSBs) - in 83 industries. A JV comprised of at least one designated WOSB or EDWOSB may compete for a WOSB or EDWOSB contract if the parties enter into a written JV agreement stating: (1) the purpose of the JV, (2) that the EDWOSB or WOSB is the managing partner and an employee of the managing partner is the project manager responsible for contract performance, (3) that not less than 51% of the net profits will be distributed to the EDWOSB or WOSB, (4) the responsibilities of the parties regarding performance, sources of labor, negotiation of the contract, and retention of contract records.[xvi]

III. CONCLUSION

FAR provisions applicable to JVs give companies seeking to maximize their competitiveness and ability to offer qualified bids additional procurement opportunities in an increasingly competitive Federal market. Challenges to the JV arrangement include allocation of management risk, and clear delineation by the JV partners of their roles and objectives. The JV agreement can address the challenges and assure a compliant and coherent management strategy for success. Carefully consider bonding capacity, financial resources, past performance, and technical proficiency and expertise of any potential JV partner. However, as a practical matter, the nature of a JV arrangement – with highly specific shared management, work sharing, risk sharing, and profit sharing requirements – may require more participant cooperation and collaboration. Consequently, other factors such as company culture, and management strength and style may become significant and can be potential sources of conflict. The most successful JVs have a shared mission aligned with the goals of each of the JV partners, as well as being well matched to work collaboratively together and to meet the requirements of the government contracts for which the JV competes.

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[i] Office of Federal Procurement Policy (OFPP), Memorandum For Chief Acquisition Officers Senior Procurement Executives Re: Development, Review and Approval of Business Cases For Certain Interagency and Agency-Specific Acquisitions (Sept. 29, 2011). OFPP Administrator Daniel Gordon subsequently explained: "Too often in the past, agency spending . . . was fragmented across multiple departments, programs, and components, which means that agencies often spent time writing hundreds of separate contracts, with pricing that varies widely. The result is a waste of limited staff time and energy, and prices that are not as good as they should be." Jill R. Aitoro, "White House pushes contract consolidation," *Washington Business Journal* (October 7, 2011).

[ii] FAR 9.603.
[iii] FAR 9.602.
[iv] FAR 19.101(7)(i).
[v] 13 CFR 121.103(h)(2).
[vi] 13 CFR 121.103(a)(6).
[vii] 13 CFR 124.513(c).
[viii] 13 CFR 121.103(h)(3)(i).
[ix] 13 CFR 121.103(h)(3)(ii).
[x] 13 CFR 121.103(h)(3)(iii).
[xi] 13 CFR 124.513.
[xii] 13 CFR 121.103(h) (emphasis added).

[xiii] 13 CFR 121.103(h).
[xiv] 13 CFR 124.1002(f).
[xv] 13 CFR 125.15.
[xvi] 13 CFR 127.506.