



**NEXT LEVEL
LEADERSHIP**

SOARING TO NEW HEIGHTS

WORKSHARE IN TEAMS & JOINT VENTURES

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OVERVIEW

- Teaming Agreements
- Subcontracts
- Joint Ventures



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TEAMING AGREEMENTS



TEAMING AGREEMENTS

- Once partners are selected, prepare and sign a teaming agreement
- What is a teaming agreement?
 - An agreement to compete together to win a specific procurement
- Must be legally enforceable, not an agreement to agree to
- Be as specific as possible
- If you win, you need a subcontract
- Documents: intentions, expectations, and responsibilities – pertaining to a SPECIFIC procurement
- Entered into between Prime Contractor and each individual teaming partner
- Roles and responsibilities of the Prime Contractor should be clearly defined
- Roles and responsibilities of each teaming partner should be clearly defined

DIVISION OF WORK

- Expectations should be agreed to with as much specificity as possible
 - Type of work
 - Amount of work
 - Performance of SPECIFIC elements of the SOW
 - Performance of minimum/maximum percentage or dollar value of the work
 - Continuity of work during the contract period of performance and beyond
- Why are specifics important?

THE OSTENSIBLE SUBCONTRACTOR RULE

- Subcontractor performs “primary and vital requirements” of a contract or order
- The Prime Contractor is unusually reliant on Subcontractor
- All aspects of the relationship between the Prime and Subcontractor are considered, including, but not limited to:
 - Terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work)
 - Agreements between the Prime and Subcontractor (such as bonding assistance or the teaming agreement)
 - Whether the Subcontractor is the incumbent contractor and is ineligible to submit a proposal
- Rule does not apply to a “similarly situated entity”



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SUBCONTRACTS

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- Same provisions from teaming agreement
- Add additional performance details, if any
- The scope of work should specifically identify SOW sections applicable to subcontractor
- The SB prime should retain control/discretion over performance, including at order level
- Specify PM roles for agency relations
- REMEMBER to follow BBNC's Contracting Compliance Policy!

“NEW” RULES FOR LIMITATIONS ON SUBCONTRACTING

- SBA regulations changed in June 30, 2016
- Same subcontracting limits as the prior rule:
 - 50% for services
 - 50% for supplies
 - 15% for general construction
 - 25% for specialty trade construction
- Different calculation
 - OLD rule: labor costs
 - NEW rule: now based on total price paid by the Government
- It's in SBA rules, but the FAR has not been updated yet
 - DOD issued class deviation for DFARS in December 2018
 - Civilian agencies still following the FAR

SIMILARLY SITUATED ENTITIES

- “New” rule allows small businesses to meet the performance requirement through their own work plus work subcontracted to “similarly situated subcontractors”
 - A similarly situated subcontractor is a firm that meets the same size/status requirements as the prime contractor for the project
 - Example: For an 8(a) prime contract, only 8(a) subcontractors would qualify as “similarly situated”
- Prime decides which NAICS code to apply to the subcontract

EXAMPLE #1 – CONSTRUCTION CONTRACT

- What the regulations says: “In the case of a contract for general construction, [SB prime] will not pay more than 85% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 85% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.”
- How it works: An 8(a) set-aside construction contract is awarded in the total amount of \$10,000,000. The 8(a) prime contractor cannot subcontract more than \$8,500,000 to non-8(a) firms.

EXAMPLE #2 – SIMILARLY SITUATED SUBCONTRACTOR

- A small business set-aside contract is awarded in the total amount of \$10,000,000 for janitorial services. The prime contractor subcontracts \$8,000,000 of the janitorial services to another small business. The prime contractor does not violate the limitation on subcontracting for services because the amount subcontracted to a similarly situated entity is excluded from the limitation on subcontracting.

EXAMPLE #3 – SIMILARLY SITUATED SUBCONTRACTOR

- A SDVOSB set-aside contract is awarded in the total amount of \$1,000,000 for landscaping services. The prime contractor subcontracts \$550,000 to a small business subcontractor that is not also a SDVOSB. The prime contractor is in violation of the limitation on subcontracting requirements because it has subcontracted more than 50% of the contract amount to a small business subcontractor, which is not considered similarly situated to a SDVOSB prime contractor.

MIXED CONTRACTS

- When services and supplies are combined, the CO will select the appropriate NAICS code best describing the principal purpose of the product or services being acquired, and that NAICS code is determinative as to which limitation on subcontracting and performance requirement will apply to the prime contract
- In no case will both a services and supplies/products calculation apply to the same procurement
- The relevant limitation on subcontracting shall apply only to that portion of the contract award amount

EXAMPLE #4 – MIXED CONTRACTS

- An 8(a) prime contractor is awarded an IT services contract for \$7 million. As part of the contract, the prime contractor must deliver \$2 million of COTS software. Under the new rule, the basis for calculation of limitations on subcontracting is \$5 million. The 8(a) prime contractor cannot pay out more than 50% of \$5 million (\$2.5 million) to a non-8(a) subcontractor.

EXCEPTIONS AND EXCLUSIONS

- When calculating compliance with the limitations on subcontracting, you may exclude:
 - Value of supplies on a services contract
 - Value of services on a supply contract
 - Cost of materials
- Limitations on subcontracting do not apply to:
 - Small business set-asides between micro-purchase threshold and simplified acquisition threshold
 - Lower-tier subcontracts
 - Except subcontracts below “similarly situated subcontractors”

MEASURING COMPLIANCE

- For total or partial set-aside contracts, compliance is judged during the base term and then each subsequent option period
- For task order contracts, CO may require compliance on an order-by-order basis
- Independent contractors
 - Considered subcontractors
 - May qualify as “similarly situated subcontractors”



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JOINT VENTURES



WHAT IS A JOINT VENTURE?

- In general: a limited purpose entity
- SBA's definition: "A joint venture is an association of individuals and/or concerns with interests in any degree or proportion 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." 13 C.F.R. § 121.103(h).

WHY DO COMPANIES JOINT VENTURE?

- The Government can look to the resources of two (or more) companies to perform the work
 - SBA regulations state that the Government must take into consideration past performance of all joint venturers on set-aside contracts
- A minority joint venture member can exert more control over contract performance to protect its interests than in a traditional prime/sub relationship
- May allow the minority joint venture member to participate in a set-aside contract that it might not otherwise be eligible for
- Attribute only the revenues to each company for the work that it performs for the joint venture, not all the revenues like a prime/sub relationship

WHAT ARE THE DOWNSIDES TO A JOINT VENTURE?

- Lead Contractor gives up substantial control
- The Government may view the joint venture as lacking a clear point of contact, thus raising concerns regarding control, authority, and accountability
- Longer, deeper commitment than traditional teaming
- Confusion over how the work is supposed to be split amongst the venturers

STRUCTURING A JOINT VENTURE

- “Corporate” forms
 - Partnership
 - Limited Liability Company
 - Corporation
- Other considerations:
 - Populated versus Unpopulated Joint Ventures
 - Management of Joint Venture

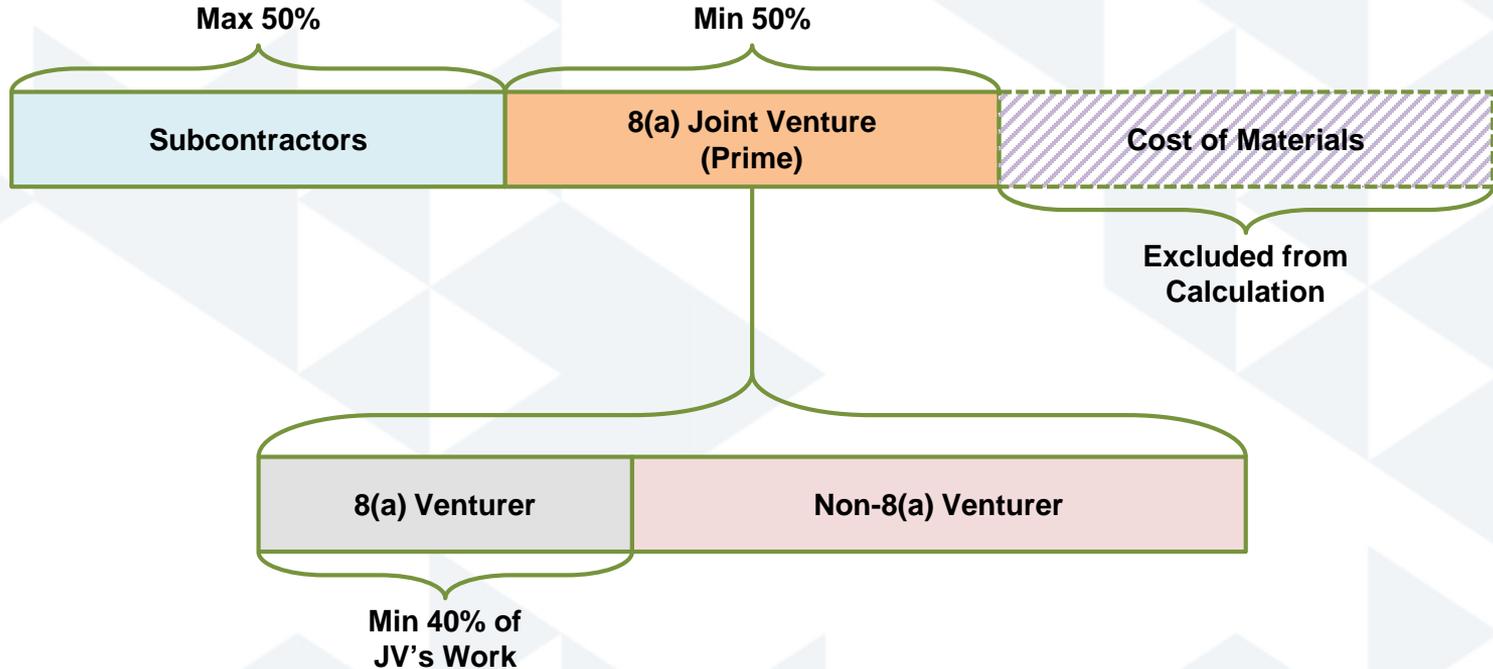
JOINT VENTURES UNDER SBA REGULATIONS

- General rule: when companies form a strategic alliance and have an identity of interest with one another, they are affiliated. Therefore, the default is that forming a joint venture will give rise to affiliation.
- HOWEVER, 13 C.F.R. § 121.103(h) lays out the exemptions to affiliation for joint ventures:
 - Joint venture of two or more businesses may submit an offer as a “small business” without regard to affiliation so long as each is small under NAICS code assigned to the contract
 - Joint venture of one small business and one other-than-small business may submit an offer as a “small business” without regard to affiliation so long as the other-than-small business is the SBA-approved mentor and the joint venture agreement complies with applicable SBA regulations
 - Must comply with “3-in-2” rule (question about MP JVs?)

JOINT VENTURING FOR 8(A) SET-ASIDES

- At least one partner must be an 8(a) firm (majority owner)
- All partners must be small businesses or large business is SBA-approved mentor
- Joint venture must comply with limitations on subcontracting
- 8(a) firm must do 40% of Joint Venture's work
- The SBA must approve the Joint Venture Agreement
 - 8(a) firm must manage
 - 8(a) employee must be the project manager
 - 8(a) company must receive profits commensurate with work performed
- Joint Venture must be registered in SAM as a joint venture

THE 40% REQUIREMENT



DISTRIBUTIONS OF PROFITS

- When and whether profits from the Joint Venture are distributed depends on at what level profits are passed on to the client
- SBA's regulations are silent on this
- Some Joint Ventures apply a markup to the work done by the Venturers—just like a prime might with its subcontractors
 - In this case, the Joint Venture itself receives profits, which must be distributed to the Venturers based on their percentage of work and at the frequency specified in the Joint Venture agreement (e.g., quarterly)
- Some Joint Ventures do not apply a markup and act as a total pass-through entity for the Venturers
 - The Venturers effectively receive payment directly from the Government for their work in the proportion of the work they performed, and there are no profits at the Joint Venture level to be distributed

JOINT VENTURING FOR SMALL BUSINESS SET-ASIDES

- At least one partner must be a small business (majority owner)
- All partners must be small businesses or the large business is SBA-approved mentor
- Small business/majority owner must do 40% of Joint Venture's work
- The SBA does not approve the Joint Venture Agreement
- Joint Venture must be registered in SAM as a joint venture

JOINT VENTURING FOR HUBZONE SET-ASIDES

- At least one partner must be a HUBZone firm (majority owner)
- All partners must be small businesses or the large business is SBA-approved mentor
 - Not yet in FAR
- HUBZone firm must do 40% of Joint Venture's work
- The SBA does not approve the Joint Venture Agreement
- Joint Venture must be registered in SAM as a joint venture

JOINT VENTURING FOR SDVOSB SET-ASIDES – NON-VA

- At least one partner must be a SDVOSB (majority owner)
- All partners must be small businesses or the large business is SBA-approved mentor
- SDVOSB firm must do 40% of Joint Venture's work
- The SBA does not approve the Joint Venture Agreement
- Joint Venture must be registered in SAM as a joint venture

JOINT VENTURING FOR SDVOSB SET-ASIDES – VA

- At least one partner must be a SDVOSB (majority owner)
- All partners must be small businesses or the large business is SBA-approved mentor
- VA's Center for Verification and Evaluation (CVE) must approve the Joint Venture

JOINT VENTURING FOR ED/WOSB SET-ASIDES

- At least one partner must be an ED/WOSB (majority owner)
- All partners must be small businesses or the large business is SBA-approved mentor
- ED/WOSB firm must do 40% of Joint Venture's work
- The SBA does not approve the Joint Venture Agreement; however, the Joint Venture Agreement must be uploaded to WOSB repository
- Joint Venture must be registered in SAM as a joint venture

TAKEAWAYS

- Always make sure that you are following BBNC policies and procedures when it comes to vetting and selecting potential teaming partners
- Remember that your authority to agree to changes to subcontract terms may be subject to review by Contracts or Legal
- Once your Joint Venture receives two contracts awards, aim to submit as many proposals as possible before you receive the third award



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