

# SMALL BIZ BASICS

## Session 4: Small Biz Contractor Relationships

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# Session 4: Roadmap

- Bringing in partners through contractual relationships
- Teaming Agreements/Subcontracts
- Joint Ventures
- Mentor-Protégé Program
- Affiliation

# What Form Should We Choose?

- Teaming Agreements
  - Traditional Subcontract
- Joint Ventures
- SBA Mentor-Protégé Program and Joint Venture

# Teaming Agreements / Subcontracts

- **Teaming Agreements with Subcontract**

- “Traditional” Prime / Sub relationship
- Only one party is the prime
- Teaming agreement lasts up until a contract is received, then parties enter into a subcontract
  - Enforceability issues? Check the state law
  - Agreement to Agree
  - For One Specific Contract/Project or for a Type of Project over a period of Time
- Teaming agreement often contains recommended provisions for the resulting subcontract
- Subcontracting limitations rule applies to Prime
- Consider ostensible subcontractor affiliation
  - Is one party so important to the transaction that the work cannot be performed without it?

# Why Team?

- Leverage capabilities/enhance competitive posture
- Reduce risk
- Facilitate market entry
- Address experience or past performance
- Opportunities to bid on set aside contracts (large businesses)



# With Whom Should you Consider Teaming?

- Factors to consider:
  - Corporate cultural compatibility
  - Compatibility of corporate management
  - Financial compatibility
  - Company Capabilities
  - Prior experience and reputation
  - Proposal development capabilities
  - Competition from potential teammate
  - Actual or potential organizational conflicts of interest
  - Conflicts and/or competition on other bids
  - Data confidentiality/security
  - Affiliation/size status



# Teaming Agreements and Subcontracts – Pros and Cons

- **PROS**

- Less expensive and less cumbersome to set up

- **CONS**

- Need to craft a teaming agreement that is concise otherwise will have issues
- Potential for conflict between terms of the teaming agreement and the subcontract
- Hard to resolve disputes
- Difficulty in enforcement
- Prime must comply with Limitations on Subcontracting Rule
  - Is this a set-aside opportunity?

# Joint Ventures

- **Joint Ventures**

- Joint Venture is the prime contractor; both businesses are part of the JV
- Permits profit sharing
- May need to form new entity
- May only be populated with administrative personnel
- Regulations regarding joint venture provisions
- Subcontracting limitations
- JVs may be Mentor-Protégé JVs, but not always

# Joint Venture Agreements – Pros and Cons

## • PROS

- Co-management
- Sharing of profits
- Equal partners – not a tiered relationship
- Favorable tax treatment (partnerships)



## • CONS

- Agreement generally must be formed before bidding on contract (although doesn't need to be registered as an "INC" or an "LLC" until notice of award)
  - If a small business, a JV Agreement is needed
- Co-management problems
- Sharing of losses
- Legal problems – jointly and severally liable for acts of joint venture partners, including criminal acts

# Mentor-Protégé Joint Ventures

- **SBA Mentor-Protégé Program and Joint Venture**

- Allows for large businesses to team with small businesses without automatically triggering affiliation
- ANY small business can form a joint venture with any mentor business that demonstrates a commitment and ability to assist small businesses.
- Note, this is a relatively recent change.
  - Prior to August 2016, Mentor-Protégé joint ventures were limited to 8(a) participants
  - In 2016, the SBA announced a new “All Small” Mentor Protégé Program, which allowed all small businesses to participate.
  - In 2020, the SBA combined the Mentor-Protégé Programs, although there are some separate rules for sole source 8(a) awards.
  - Today, there are minor nuances between the various Socioeconomic Program regulations (discussed last week) and the MPP JV Regulations.

# SBA Mentor-Protégé Joint Venture Agreement

- **PROS**

- Allows large businesses to participate in small business set-asides without a finding of affiliation
- Helps small businesses win larger projects

- **CONS**

- Additional regulations
  - Greater scrutiny with the popularity of the program
- Non-compliance of the Mentor (as determined by the SBA) may be grounds for suspension/debarment
- Workshare Splits (discussed below) can be difficult

# Mentor-Protégé Programs (MPPs)

- Two separate Mentor-Protégé Programs that are closely aligned:
- 8(a) Mentor/Protégé (13 CFR 124.520)
  - To qualify as a protégé:
    - Be a small business with industry experience
    - Be organized for profit or as an agricultural cooperative
    - Have a proposed mentor prior to applying for the program
  - Requires SBA pre-approval of both mentors and protégés
    - A mentor-protégé agreement (MPA) is required.
      - Required contents are listed at 13 CFR 125.9
    - For 8(a) sole source set-aside contracts, an 8(a) participant's JV must be approved by the SBA prior to contract award
      - Required contents are listed at 13 CFR 124.513

# Mentor-Protégé Programs – Cont'd

- SBA Mentor-Protégé Program: all businesses considered small under their primary NAICS code (13 CFR 125.9)
  - Rules built from the 8(a) BD MPP, with minor variations for 8(a) sole source awards
    - Joint venture requirements vary between 8(a) BD and All Small – most of these have been aligned, but use caution
  - Protégé qualifications:
    - Small business under primary NAICS code or relevant secondary code
    - For profit
    - A significant U.S. connection (place of business, operations, contributions)
- Other small business preference programs can participate:
  - Veteran & Service-Disabled Veteran Owned
  - HUBZone
  - Women-Owned
  - Economically Disadvantaged Women-Owned
- SBA Mentor-Protégés are not eligible for 8(a) unless one party to the JV is a certified 8(a)

# Mentor-Protégé Programs – Cont'd

- Both MPPs require:
  - a second mentor-protégé relationship requires special approval
  - 13 CFR 125.6: percentage limitations on subcontracting apply:
    - Discussed below
  - Small business Protégés must perform at least 40% of the substantive work performed by the JV (workshare)
    - The JV itself can subcontract directly with third parties.
  - If seeking mentor-protégé relationship under secondary NAICS code, the small business must demonstrate how the mentor-protégé relationship is a logical business progression to develop and expand their current capabilities
- Protégés have a lifetime maximum of 2 mentors.
- Applications reviewed at central, national site rather than at local SBA offices.
  - Current processing time is 105 business days

# Mentor-Protégé Programs – Cont'd

**Don't confuse** the DoD Mentor-Protégé Program (MPP) with the SBA Mentor-Protégé Program

- DoD MPP was a “pilot” program that became permanent under the fiscal 2023 National Defense Authorization Act (NDAA).
  - Focus is on tech/skill transfer, not on set-asides.
  - Pairs large federal contractors (Mentors) with small business subcontractor (Protégés).
  - Size restriction – Protégé must be less than half the size standard for its primary NAICS code.
- Generally, Mentors subcontract with Protégés:
  - Mentors receive a contractual credit or reimbursement for the costs of mentoring the protégé.
  - SBA will no longer allow small business credit to be taken for the portion of a subcontract that a large entity provides to its own mentor-protégé joint venture and then performs as a partner.
  - Subcontracts count toward subcontracting plan goals.
  - Unlike SBA MPPs, there is no minimum substantive work requirement for DoD Protégés (or conversely, there is no minimum work guarantee for the Protégés either).

# MP Joint Venture Rules

- MP Joint Ventures:
  - A SB may enter into a Joint Venture Agreement with:
    - Another small business concern; or
    - Its “mentor”
  - 8(a) Sole Source Set Asides - Joint venture agreement must be approved by SBA prior to award
    - A separate addendum to the JV agreement must be approved by the SBA for any additional contract the JV will receive
  - For non-MPP JVs, only one of the joint venture partners must be certified, but all must be small for the JV to count as small
  - Permissible only where Protégé concern lacks necessary capacity to perform on its own and agreement is fair and equitable and will be of substantial benefit to the Protégé

# MPP Joint Venture Rules (cont'd)

- The SB partner (protégé) must
  - manage the contract;
  - furnish the Responsible Manager;
  - manage the day-to-day operations of the JV;
  - own at least 51% of the JV;
  - perform at least 40% of the work performed by the JV; and
  - receive profits commensurate with the work performed.
- Very specific provisions required in JV agreement (see 13 CFR 124.513(c)(1)-(12))
- JVs that are a separate legal entity may only have administrative personnel
  - Unpopulated
  - The Responsible Manager is employed by the Protégé

# Small Business Subcontractor Limitations (FAR 52.219-14; 13 CFR 125.6)

Small Business Must Satisfy the Following Percentages By Own Efforts and Those of “Similarly Situated” Subcontractors When Subcontracting:

- Construction by special trade contractors – 25% of the total amount paid by gov’t (excludes material cost)
  - General construction – 15% of the total amount paid by gov’t (excludes material costs)
  - Non-construction services – 50% of total amount paid by gov’t
  - Supplies or products – 50% of total amount paid by gov’t (cost of materials excluded and not considered subcontracted)
- 
- Mixed contract? Look at NAICS code!

# Small Business Subcontractor Limitations (Cont'd)

- Who is similarly situated? (cont'd)
  - Only the first-tier subcontractors may be counted as “similarly situated” – ANY work subcontracted beyond the first-tier does not count, even if it would otherwise qualify as “similarly situated”
    - Note: this should not be confused with the rules for *subcontracting plans* under FAR 19.702, which effective Jan. 23, 2017, will allow *prime contractors* to receive credit for subcontractors in various preference programs at any tier
- Be careful – penalties could be harsh
  - Suspension, debarment, administrative remedies, fines, and even imprisonment
  - The 2013 NDA mandated fines must be the greater of either \$500,000 or the dollar amount spent in excess of the permitted levels for subcontracting.
  - Some contracts will have FAR 52.219-16 Liquidated Damages for Small Business Subcontracting

# Affiliation

- Effect of a finding of affiliation: add the sizes of the prime and subcontractor together for size eligibility purposes
  - For the purposes of this award
- Numerous ways entities can be found affiliated (e.g., ownership, identity of interest, common management, etc...)
- “totality of the circumstances”
- Ostensible Subcontractor Rule:
  - SBA may find a small prime affiliated with its subcontractor if:
    - The subcontractor performs the “primary and vital” parts of the contract and/or;
    - The prime contractor is unusually reliant upon the subcontractor



# Joint Ventures and Affiliation

- Joint ventures can give rise to a finding of affiliation
  - Previously, Joint ventures could not be awarded more than three contracts over a two-year period, starting from the date of the award of the first contract (Old Three-in-Two Rule)
  - Now, the number of contracts is unlimited, but the Two Years still applies.
    - If the JV is awarded a contract, then it may be awarded an unlimited number of additional contracts prior to the contract date + 2 years.
  - Partners will generally form second JV
  - Can have multiple joint ventures, but eventually may lead to a finding of affiliation
- SBA Regulations create an exception to the affiliation rules for certain joint ventures
  - Both concerns must be small under the NAICS code assigned to the contract
  - 13 CFR 121.103(b)(6)
    - (6) A firm that has an SBA-approved mentor-protégé agreement authorized under § 125.9 of this chapter is not affiliated with its mentor or protégé firm solely because the protégé firm receives assistance from the mentor under the agreement. Similarly, a protégé firm is not affiliated with its mentor solely because the protégé firm receives assistance from the mentor under a federal mentor-protégé program where an exception to affiliation is specifically authorized by statute or by SBA under the procedures set forth in § 121.903. Affiliation may be found in either case for other reasons as set forth in this section.

# So, What Form Should We Choose?

- It depends! What is your Goal?
  - Teaming Agreements/Subcontract
  - Joint Ventures
  - Joint Ventures Involving a Mentor-Protégé

# QUESTIONS?

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