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SEBAC
Small Environmental Business Action Coalition

"THE INS AND OUTS OF JOINT VENTURE AGREEMENTS"

PilieroMazza / SEBAC Webinar

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WHAT IS A JOINT VENTURE?

- **A Joint Venture is:**
  - "A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, 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)

TEAMING AGREEMENT *VS.* JOINT VENTURE

- **Liability**
  - JV partners jointly responsible for contract performance, and except in LLC, jointly and severally liable
  - Subcontractor only responsible for portion of work it performs, limited liability
- **Control**
  - Shared by JV partners
  - Prime Contractor has control over teaming relationship
- **Bonding**
  - JVs typically able to obtain bonding based on combination of all partners
  - Prime/sub may work also, but likely requires agreement of all parties to be bound and collateral from owners

ADVANTAGES OF A JOINT VENTURE

- The Government can look to the resources of two (or more) companies to perform the work;
- A minority joint venture member can exert more control over contract performance to protect its interests than in a traditional prime-sub relationship; and
- Allows firms to stay smaller longer.

DISADVANTAGES OF A JOINT VENTURE

- Lead Contractor gives up substantial control;
- The participating contractors (except in an LLC) become joint and severally liable to third parties for the acts of their joint venture partners, including criminal acts;
- The Government may view the JV as lacking a clear point of contact, thus raising concerns regarding control, authority, and accountability;
- Terminating a JV may be more difficult than terminating a subcontract agreement while the prime contract is being performed; and
- Government may raise past performance questions.

TIMING OF JOINT VENTURE RELATIONS

- Joint Ventures should be formed before the offer is submitted.
- Agreement should provide for performance of the contract – avoid “agreement to form a joint venture.”
- FAR requires that nature of the joint venture be fully disclosed in the proposal.

ABOUT JOINT VENTURES

- Main Characteristics:
  - Co-management
  - Sharing profits and losses
  - Limited duration

ABOUT JOINT VENTURES

- Competing as a Joint Venture:
  - Joint ventures should be formed before submitting offer
  - Agreement should provide for contract performance
  - FAR requires disclosure in the proposal

ABOUT JOINT VENTURES

- Forms of Joint Venture:
  - Partnership
  - Limited Liability Company
  - Corporation (almost never used)

STRUCTURING A JOINT VENTURE

- Choice of Structure
- Other considerations:
  - Populated v. unpopulated joint ventures
  - Limitations on Subcontracting – for set-asides
  - Avoiding “general” affiliation

JOINT VENTURE: MANAGEMENT STRUCTURE AND LABOR

- What will be the management structure of the Joint Venture?
  - Management Committee?
  - Project Manager?
- Which party will be responsible for negotiating contracts?
- Which party will be responsible for negotiating subcontracts with subcontractors?
- What are the sources of labor to be employed?
- How do the parties envision the division of labor on contracts?

GENERAL PROVISIONS

- Must be Included in Joint Venture Agreements for Small Business Set-Asides
  - Purpose of the Joint Venture.
  - Designation of SBC as managing venturer.
  - Not less than 51% of net profits earned by Joint Venture will be distributed to the SBC participant.
  - Responsibilities of the parties.
  - Obliging parties to Joint Venture to ensure performance of government contract.
  - Designation that accounting/administrative records are kept by managing venturer and requirement that managing venturer retain records of contracts completed by Joint Venture.
  - Performance of Work.
  - Inspection of Records.

POPULATED JOINT VENTURES

- PROS:
  - One seamless entity performs work.
  - Reduces possible confusion in evaluating proposal.
  - The Joint Venture subcontracts directly with subcontractors.

- CONS:
  - The Joint Venture and not the joint venture partners earn past performance.
  - Partners only receive proportionate share of the profits.

UNPOPULATED JOINT VENTURE

- PROS:
  - Each Joint Venturer performs work as subcontractor to Joint Venture.
  - Each Joint Venturer receives a fee on the work it performs.
  - “Joint Venture” may charge a handling fee at prime Contract level.

- CONS:
  - Companies may have different benefit packages.
  - Procuring Agency may not understand who is performing work if Joint Venture is unpopulated.

JOINT VENTURES: SMALL BUSINESS SET ASIDES

- The “3-in-2” Rule; JV is eligible for three awards in two years
- Government can award to JV if contract:
  - Exceeds ½ of revenue-based size standard
  - Exceeds $10M (employee-based size standard)
  - All partners must be small, except for SBA-approved 8(a) Mentor-protégé relationship.

SUBCONTRACT LIMITATIONS

- Performance of work under joint ventures.
- Work of joint venture counts towards subcontracting limitations.

JOINT VENTURES: 8(a) SET ASIDES

- Government can award 8(a) contracts to JV if:
  - One firm is 8(a) certified and ½ the size standard
  - All partners are SBs, unless in Mentor-Protégé

JOINT VENTURES: 8(a) SET ASIDES

- The SBA must approve the JV agreement, prior to award
  - 8(a) firm must manage.
  - 8(a) firm must furnish project manager.
  - If Populated JV, 8(a) firm must receive at least 51% of profits.
  - If Unpopulated JV, each partner receives profit on work performed.

JOINT VENTURES: HUBZONE CONTRACTS

- All partners must be HUBZone.
- All partners must be <u>small</u>.
- The <u>contract</u> must meet certain size requirements.

JOINT VENTURES: SDVOSB CONTRACTS

- Managing partner must be SDVOSB.
- All partners must be small.
- 51% or more of profits must go to SDVOSB.
- LLC option no longer questionable.
  - 2011 OHA Decision reversed earlier decisions requiring the service-disabled veteran to have direct ownership of the Joint Venture.

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