

THE CHALLENGING CLIMB  
TO REACH NEW HEIGHTS

## Strategic Considerations and Small Business Requirements Driving Unique Business Combinations

Amy O'Sullivan

Ryan Tisch

Judy Choi



# Overview

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- Structural Options for Proposals and Key Characteristics
  - Prime/Sub
  - Joint Venture
  - Contractor Team Arrangement (CTA)
- Advantages/Disadvantage for Structural Options
- Eligibility Nuances and Timing Factors Impacting Approach
  - Unique RFP Terms
  - GSA Schedule/Other IDIQ
  - Small Business Set-Asides
- Competition Considerations and Regulatory Concerns



## Structural Options for Proposals and Key Characteristics

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### **Prime/Sub or Standard Teaming Relationship**

- One party leads and will serve as prime contractor
- Other teammates will serve as subcontractors
- Relationship begins with a teaming agreement and joint proposal effort
- Parties enter into subcontract agreements if team wins contract award

### **Joint Venture**

- Parties form and jointly own and manage a new legal entity
- Parties may contribute assets, technology and personnel to JV
- JV seeks contract and will serve as prime contractor
- JV itself may perform contract in whole or in part
- JV may subcontract performance to JV partners or other contractors



# Structural Options for Proposals and Key Characteristics

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## Contractor Team Arrangement (CTA)

- Unique GSA structure that is hybrid between JV and prime/sub
- Two or more GSA Schedule contractors team together to combine supplies and/or services from each member's separate Schedules in response to a buyer's solicitation
- Allows contractors to compete for orders for which they do not independently qualify
- Does not create a separate legal entity
- Each CTA member has privity of contract with the Government
- Roles and responsibilities defined in CTA Agreement, submitted as part of response to the solicitation
- For small business set-aside opportunities, all members of the CTA must meet the size/socioeconomic threshold



# Advantages of Teaming Compared to JV

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- Generally easier and quicker to arrange than a JV
- More familiar approach to many organizations
- Reduced need to arrange chains of command
- No need to create separate organization or allocate resources
- Quantifiable costs and known lines of responsibility at the RFP stage
- Leads to a prime-sub relationship – a common and generally well understood structure
- If the prime, will have more control over customer relationship and contract performance
- “Divorce” is easier with straightforward termination options
- No risk associated with “new” entity with no past performance
- If prime, easier to claim full credit over past performance resulting from contract
- Subs can be more readily firewalled if concerns re OCI risks



# Disadvantages of Teaming Compared to JV

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- One party must take the lead as the prime, no joint governance
- Other parties will have less influence over customer relationship and contract performance
- Parties are not able offer joint “best of breed” contract management and performance
- Can only rely on one entity to meet offeror go/no-go requirements
- Parties are not able to share profits from overall project
- More difficult to pool assets, personnel, technology and other resources
- A JV can sometimes be more price competitive – due to differing cost accounting treatment
- Generally must allocate project tasks before contract award (SOW to teaming agreement)
- Added risks if small business is prime (ability to obtain bonding, assurance of timely payment from prime, understanding of authority for changes, etc.)
- Greater potential flight risk prior to execution of subcontract



# Advantages/Disadvantages of CTA

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- Often a stated preference from GSA
- Must still determine which contractor will serve as lead
- May be only way to meet scope of solicitation requirements
- Potential proposed cost savings if CTA partners have lower rates than lead
- Each member can charge up to its full Schedule rates for supplies/services it is providing
- Shares risk across CTA members
- Provides greater opportunities for small business concerns
- Lack of guidance on formation of CTA and performance of contract
- Resources required to negotiate CTA Agreement document, which is negotiated among members without Government input



# Solicitation-Specific Considerations Relevant to Structure

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## Understand eligibility factors, long-lead items, and approaches to enhance evaluation ratings

- Set-Aside
  - Limitations on subcontracting
  - Timing and willingness to pursue Mentor-Protégé JV
- Past performance/experience requirements that must be fulfilled by prime
- Small business subcontracting goals and opportunities
- Facility clearance requirements
- GSA Schedule or other limitation to IDIQ contract holders
- SOW/PWS requirements for prime
- OCI risks and ability to firewall
- Financial status/responsibility risk
- Approved accounting system
- Authority to Operate or other license/accreditation requirements





## Set-Asides and Eligibility/Protest Risk

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- Difficult to challenge set-aside determination – market research based (Rule of Two)
- Prime must meet applicable size standard (and other disadvantaged status depending on type of set-aside) at time of proposal submission
- Know and comply with limitations on subcontracting
  - Multiple tests
  - Different methods of calculation in FAR and SBA regulations – clarify applicability
- Understand size protest risk based on ostensible subcontractor rule – four key factors:
  - (1) Sub is incumbent and ineligible to bid as prime
  - (2) Prime plans to hire majority of workforce from sub
  - (3) Prime’s proposed management previously served with sub on incumbent contract
  - (4) Prime lacks relevant experience and must rely on more experienced sub
  - If 4 factors present, “violation of the ostensible subcontractor rule is more likely to be found if the proposed subcontractor will perform **40% or more** of the contract”
- Limited JV options
  - Both members qualify as small
  - Mentor-protégé JV (only option if a member is a large business)



# Set-Asides – Mentor-Protégé JV Considerations

- Long lead – must have mentor protégé relationship approved by SBA before proposal and JV formed
- JV agreement must comply with applicable SBA regulatory requirements – eligibility for prime or subcontract is based on size and status of protégé
- Protégé is managing venturer and must have control over decision-making (affirmative and negative) with limited exceptions over extraordinary actions
- Protégé employee must be project manager responsible for performance of the contract
- JV must comply with limitations on subcontracting and protégé must perform at least 40% of work performed by JV members
- JV must be in writing and do business under its own name; must be identified as JV in SAM; may be in the form of a formal or informal partnership or a separate legal entity (only unpopulated or thinly populated with admin personnel only)
- For separately legal entity – protégé must own at least 50%
- Share of profits must be commensurate with performance of work
- All parties to JV must ensure performance of contract despite withdrawal of member
- Track the “3 in 2” rule and plan ahead to form new JVs as necessary



# GSA Schedule/Other IDIQ

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- Prime contractor must hold Schedule and applicable SIN to be eligible for Schedule orders
  - No corresponding requirement for subcontractors
- Members of CTA are co-prime contractors: each member must hold Schedule contract and specific SIN (if required by solicitation)
- JV itself must hold a Schedule contract in order to be eligible for orders, even if individual members of JV all hold a Schedule contract
  - Long lead time to obtain GSA Schedule
- GSA small business set-aside contracts subject to limitations on subcontracting:
  - Prime contractor must perform at least 50% of value of the work; remainder can be performed by subcontractor without regard to size or socioeconomic status
  - For CTA, the CTA team must perform 50% of the value of the work in aggregate (50% can be allocated in any way among the team members)
  - All members of CTA must meet eligibility requirements of small business set-aside
- Other IDIQ contract vehicles may have requirements that drive options available to contractor



# Competition Law Considerations

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- Applicable Law
- Rule of Reason Analysis
  - Competitive Benefits of Teaming
  - Potential for Competitive Harm
- “Spillover” Risk
- Best Practices



# Applicable Competition Law

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- FAR Subpart 9.6:

“The Government will recognize the integrity and validity of contractor team arrangements; *provided*, the arrangements are identified and company relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective. The Government will not normally require or encourage the dissolution of contractor team arrangements”

**BUT:**

**“Nothing in this subpart authorizes contractor team arrangements in violation of antitrust statutes”**



# Competition Analysis

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- Teaming agreements are generally analyzed under a balancing test for their overall competitive effects (the “Rule of Reason”)
- The DOJ, FTC, and DoD have all recognized the potential competitive merits of teaming:
  - “In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs”
  - DoD withdrew proposed DFARS rule mandating extra competition scrutiny of teaming arrangements in 2002
- The key is to ensure your teaming agreement maximizes procompetitive attributes and minimizes the potential for anticompetitive harm



# Competitive Benefits

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- Teaming agreements generate lower risk under antitrust laws where:
  - They are nonexclusive
  - Team members' capabilities are complementary rather than overlapping
  - Benefits of complementarity are obvious ( $1 + 1 = 3$ )
  - Other options are available
  - The teaming arrangement has been disclosed, either at the offer stage, or less helpfully, before the arrangement is finalized



# Competitive Risks

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- Teaming agreements may generate higher risks where:
  - They are exclusive
  - Team members could take part in the procurement process on their own
  - There is little complementarity in the team members' capabilities
  - There are few true competitors to the team
  - The teaming arrangement is disclosed late in the process, or where the government agency has expressed discomfort





# Spillover Risks

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- Teaming agreements may also pose “spillover” risk:
  - Competitors who team together may be accused of criminal antitrust collusion based on their interactions outside the boundaries of the teaming arrangement
  - This risk may include allegations of price fixing, bid rigging, or other market allocation
  - These offenses are “*per se*” and not subject to the rule of reason
- To manage risk, team members should:
  - Carefully manage communications and meetings to address only topics related to the teaming arrangement and the contract/opportunity at hand
  - Train employees to know and respect these boundaries
  - Seek legal advice before changing the scope or purpose of a teaming arrangement



# Best Practices

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- When forming a new teaming agreement:
  - Document the purpose of the agreement, including the unique benefits of approaching the opportunity jointly
  - Consider broader competitive dynamics (other options; team members’ ability to “go it alone”)
  - Consider disclosure strategies, accounting for agency-specific disclosure requirements and timing options
- When bidding/performing under a teaming agreement:
  - Set out ground rules describing the arrangement’s scope, and appropriate ways to communicate between team members
  - Train key employees to understand antitrust risk, champion compliance with ground rules, and elevate questions to counsel where appropriate



# Contact Information

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**Amy O'Sullivan**

[aosullivan@crowell.com](mailto:aosullivan@crowell.com)

202.624.2563

**Ryan Tisch**

[rtisch@crowell.com](mailto:rtisch@crowell.com)

202.624.2674

**Judy Choi**

[jchoi@crowell.com](mailto:jchoi@crowell.com)

202.624.2954

