



TRI - REGIONAL JETS 2025



Pros and Cons of Joint Ventures and Teaming Agreements

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Pros and Cons of - Joint Ventures and Teaming Agreements

Speaker:

- David A. Rose, Lt Col, USAF Retired
- Principal Attorney

Moderator:

- Pat Dugan, PE, PMP
- DLR Group



SPEAKER

David A. Rose, Lt Col, USAF, Retired

ROSE CONSULTING LAW FIRM
Principal Attorney

- **Sports Teams: University of Georgia – Go DAWGS!**
- **Vacation Spots: Europe Caribbean**
- **Did You Know: I was an officer in the military (Army Navy and USAF for 28 years)**
- **Hobbies: Travel (See above), flying single engine aircraft, Scouting**
- **Cooler Project(s): Military Recruiting, GA Politics, STEM Projects**



MODERATOR

Pat Dugan, PE, PMP
DLR Group Washington DC



- **Sports Teams:** THE Ohio State University, Cincinnati Reds and Bengals
- **Vacation Spots:** Sailing in USVI and BVI
- **Did You Know:** I was Santa to kids in remote villages around Kodiak Island, Alaska. We got there via U.S. Coast Guard helo
- **Hobbies:** Being a Dad, biking, working out, anything involving Home Depot
- **Coollest Project(s):** I designed a pier for Coast Guard boats in Lake Tahoe, 7 months from learning of the project to ribbon-cutting the new one

What is the Difference?

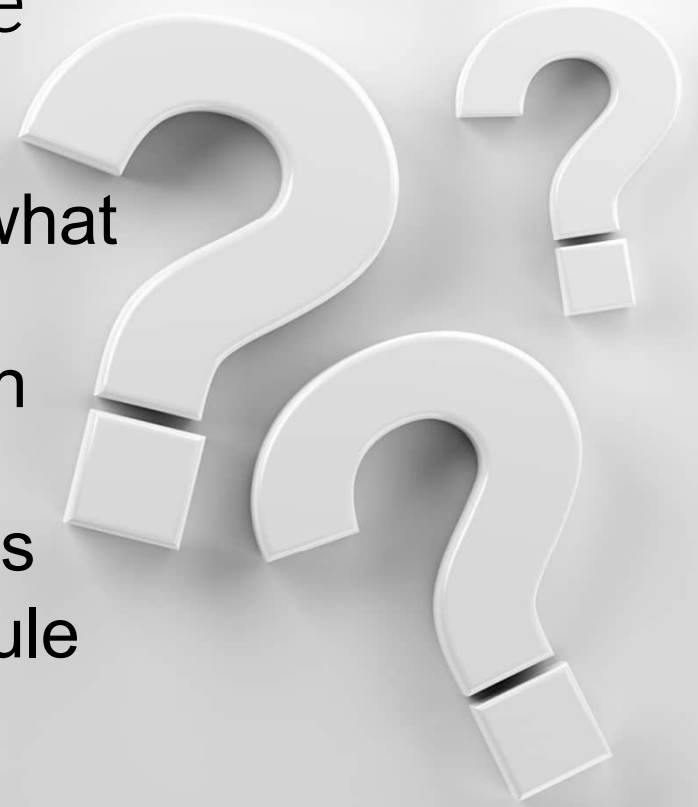
- Joint Venture
 - An arrangement that forms a partnership (preferably a Limited Liability Company is formed) with Joint and Several Liability.
 - We advise against a Partnership arrangement for this reason
 - Strong protection for Members
 - All Members get a say in the management of the contract

What is the Difference?

- Teaming Agreement
 - An arrangement that forms a formal Prime Subcontractor relationship
 - Small Business Prime is in control
 - Simply amounts to – as a reminder- a prime sub relationship
 - Liability to Government is not shared but rests on Prime contractor

SO ... How to Choose

- Not a simple analysis
 - The choice typically boils down to what the strongest member desires
 - It is affected by the Limitations on Subcontracting Rules,
 - The Joint Venture Affiliation Rules
 - The Ostensible Subcontractor Rule
 - Control Issues



SO ... How to Choose

The Limitations on Subcontracting Rules

- This varies by specific type of contract
- Services, Supplies or Construction
- Found at 13 CFR 125.6
- For construction the Prime only has to perform 15% of the work – this leaves a lot of work for the large business subcontractor
- For services it allows for a 50/50 split. If we have a weak prime, a mentor protégé JV might work better with a 60/40 split (60 to large business)

Pros of Either

- **Increased Resources:** The Government can leverage the resources of two or more companies to perform the work.
- **Comprehensive Service:** The team or joint venture provides “one-stop shopping” for the Government, combining the technical and other resources of the Members.
- **Past Performance Consideration:** A Joint Venture allows the mentors past performance to play a major role and a Team Subcontractors experience may be used where solicitations state that past performance of team subcontractors will be considered.
- **Set-Aside Opportunities for Large Businesses:** Large businesses may pursue set-aside opportunities for which they would otherwise be ineligible.

Pros of Joint Venture

- **Combined Performance History:** The joint venture has a performance history that reflects the combined experience of each Member.
- **Future Proposals:** Each Member can cite the joint venture contract as past performance in future proposals.
- **Increased Control for Small Business:** The joint venture allows a Member to have greater control over prime contract performance than it would as a subcontractor.
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Pros of Joint Venture

- **Receipt and Employee Count:** Small businesses must include their proportionate share of joint receipts or joint employees in their receipts or headcount.
- **Extended Small Business Status:** Small businesses can qualify as “small” for a longer duration.
- **Work Share Flexibility:** Large businesses can perform up to 60% of the work. Better for services contracts, e.g. A/E firms.
- **Control Over Performance:** Large businesses may have greater control over contract performance compared to if they were a subcontractor.

Pros of Teaming

- **In Construction – Greater opportunity for Large Business to perform more of the work – LOS allows up to 85% of the revenue to be paid to the large business.**
- **Small Business Competitiveness: Enables a small business to be competitive as a prime contractor.**
- **Small Business gets experience on large projects as a prime contractor**
- **Quick to set up – no regulatory approval**

Cons of a Joint Venture

- **Control Loss:** The lead contractor gives up substantial control over the project.
- **Liability:** Participating contractors become jointly and severally liable to third parties for the acts of their joint venture partners, including criminal acts.
- **Government Perception:** The Government may view the joint venture as lacking a clear point of contact, raising concerns regarding control, authority, and accountability.
- **Termination Difficulty:** Terminating a joint venture may be more complex than terminating a subcontract agreement while the prime contract is ongoing.
- **Performance Questions:** Competitors may raise questions about past performance.

Cons of a Joint Venture

- **Familiarity Issues:** Some officials may not be familiar with the joint venture model, leading to concerns about responsibility for contract performance or nonperformance.
- **Communication Challenges:** It can be challenging for members to “speak with one voice.”
- **Work Allocation:** Depending on the joint venture structure, a member may receive less work than it would as a subcontractor or a single prime contractor.
- **Administrative Complexity:** Setting up a joint venture involves more paperwork and can be more expensive and complicated.
- **Shared Liabilities:** All liabilities are shared by all members.
- **Difficult Exit:** Joint venture relationships are harder to exit if they do not work out.

Cons of a Teaming Arrangement

- The Large Business is for all practical purposes – a subcontractor
- It is easy for the Small Business to become the subject of an Ostensible Subcontractor (next slide)
- The Small Business is directly liable for completion of the project to the Agency
- The Small Business is likely to have a great deal of the liability and much less of the profit
- The Small Business has to claim all of the revenue paid by the Government towards its small business status
- The Agency may not count the large businesses experience
- The Teaming Agreement must be written a very specific way to avoid being unenforceable – an agreement to agree is not enforceable – requires a subcontract as well

Ostensible Subcontractor

- 13 CFR § 121.103 - How does SBA determine affiliation?
 - (a) General Principles of Affiliation.
 - (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.
 - (5) In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.
 - (h)(3) Ostensible Subcontractor
 - A prime contractor may use the experience and past performance of a subcontractor to enhance or strengthen its offer, including that of an incumbent contractor. It is only where that subcontractor will perform primary and vital requirements of a contract or order, or the prime contractor is unusually reliant on the subcontractor, that SBA will find the subcontractor to be an ostensible subcontractor.

Conclusion

- This is a short introduction into the frightening world of teaming.
- As a final aside, note that the FAR at Subpart 9 (Small Business) and the SBA at 13 CFR are not congruent on what constitutes Teaming versus Joint venturing. The FAR considers both to be Teaming whereas the SBA focuses on JVs and spends little time on Teaming (if none at all) other than the staunch warning about Ostensible Subcontractors and the other Affiliation issues.
- Not trying to drum up business here, but when you have these decisions to make – it is possibly wise to seek the opinion of a Small Business – Government Contracts attorney. As Benjamin Franklin said:
- “An ounce of prevention is worth a pound of cure”

Where Can I Find the CFR?

Federal Regulations (CFR) on-line:

☐ <http://ecfr.gpoaccess.gov>

Size regulations -- 13 CFR Part 121

8(a) & SDB regulations -- 13 CFR Part 124

Government Contracting Programs – 13 CFR Part 125.6

HUBZone Program – 13 CFR Part 126

Service Disabled Veteran Program – 13 CFR 125

Women-Owned Small Business Program-13 CFR 127



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Q&A / Discussion

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