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JOINT VENTURES AND TEAMING ARRANGEMENTS: REQUIREMENTS, RISKS AND OPPORTUNITIES

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AGENDA

- Strategic Considerations
- Structuring the Joint Venture
- Joint Ventures Under the FAR
- Antitrust Issues

Strategic Considerations

STRATEGIC CONSIDERATIONS

- What is a Joint Venture?
 - an entity (e.g., limited liability company, corporation) formed between two or more parties to undertake business activities together
 - the parties contribute equity and share in revenues, expenses, and control of the entity
 - the venture can be for one specific project or for a defined scope of business activities

The term is often used for a variety of other arrangements

STRATEGIC CONSIDERATIONS

TEAMING ARRANGEMENTS

- Other types of teaming arrangements
 - Teaming agreement between potential prime contractor and potential subcontractor
 - Usually contemplates the negotiation of a subcontract if/when prime wins contract
 - GSA Schedule Contractor Team Arrangement
 - Arrangement in which two or more GSA Schedule contractors team together to provide a total solution to meet a customer's needs
 - Does not create a separate legal entity, but allows contractors to combine supplies/services from each team member's Schedule contract

STRATEGIC CONSIDERATIONS

TEAMING ARRANGEMENTS—CONTINUED

- Applying joint venture concepts can result in the creation of unintended implied duties among the parties
- To understand the obligations the parties have to each other and the rights and obligations of the venture under state and Federal law, one must:
 - know the legal form of the venture (partnership, corporation, limited liability company) and the legal implications of doing business in that form and
 - review the document(s) that govern the joint venture to determine contractual rights and obligations

STRATEGIC CONSIDERATIONS

Spectrum of Commitment to the Joint Economic Activity from Early Stage of Consideration to Enforceable Commitment to do Business Together

Early
Consideration

Enforceable
Commitment



Letter of Intent (LOI)
Memorandum of Understanding (MOU)
Teaming Agreement

Joint Venture

STRATEGIC CONSIDERATIONS

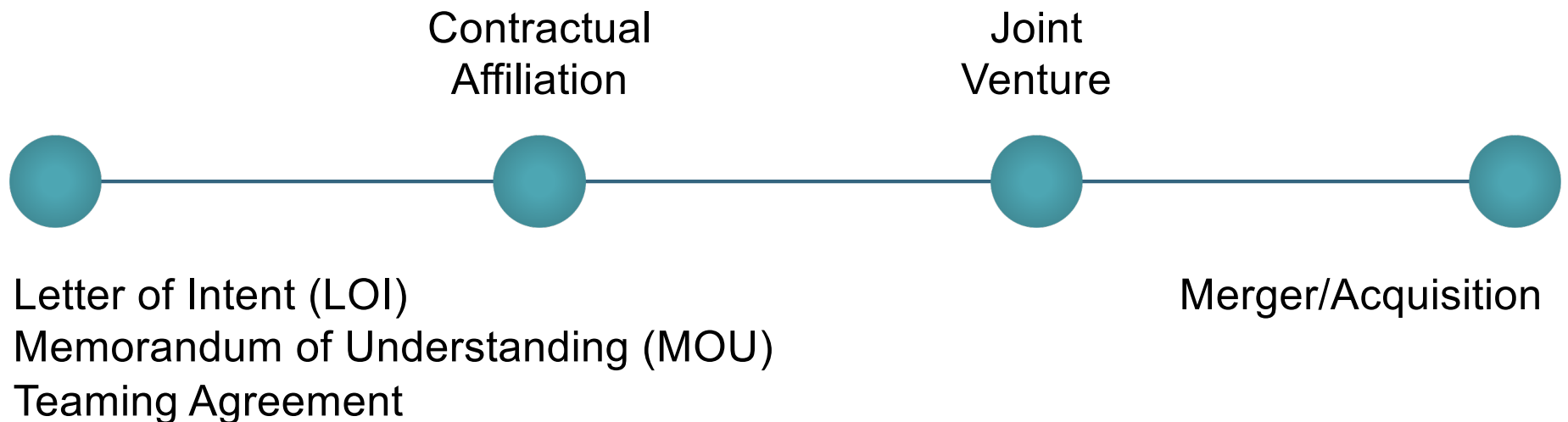
- Enforceability of Teaming Agreements—Post-Award Obligations
 - Provisions in a teaming agreement requiring the parties to negotiate a subcontract after prime contract award are generally unenforceable “agreements to agree.” *E.g.*, *CGI Fed. Inc. v. FCI Fed., Inc.*, 295 Va. 506, 814 S.E.2d 183, 188 (2018); *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F. Supp. 2d 572 (E.D. Va. 2013), *aff’d*, 549 F. App’x 211 (4th Cir. 2014).
 - In some jurisdictions, a limited duty to negotiate in good faith may be enforceable, although the burden of demonstrating breach and causation/damages is difficult. *E.g.*, *Advance Telecom Process LLC v. DSFederal, Inc.*, 119 A.3d 175, 185 (Md. Ct. Spec. App. 2015) (discussing *Cyberlock* and holding that the teaming agreement “contained some obligations that were enforceable,” including the obligation to negotiate in good faith).

STRATEGIC CONSIDERATIONS

- Enforceability of Teaming Agreements—Pre-Award Obligations
 - Pre-award obligations (e.g., submission of a proposal identifying the parties as prime and subcontractor; exclusivity) can be enforced if expressed clearly and definitely in the agreement. *CGI*, 295 Va. at 510, 814 S.E.2d at 185.
 - See also *X Techs. Inc. v. Marvin Test Systems, Inc.*, 719 F.3d 406, 408 (5th Cir. 2013) (affirming judgment against contractor that “breached an exclusive teaming agreement to submit a teamed bid . . . by teaming with another partner . . . on a competing bid”); *ATACS Corp. v. Trans World Commc’n., Inc.*, 155 F.3d 659, 668 (3d Cir. 1998) (affirming trial court’s determination that teaming agreement created an enforceable obligation to “work exclusively” with one another).

STRATEGIC CONSIDERATIONS INTEGRATION

Spectrum of Collaboration/Integration for Joint Economic Activity from Least Integration to Most Integration (i.e., harder to separate)



STRATEGIC CONSIDERATIONS

- Why do Contractors (rightly or wrongly) enter into JVs?
 - to establish a foothold in a new market;
 - to avoid or reduce allocation of indirect expenses (general and administrative, home office expenses) thereby reducing proposed contract price;
 - to take advantage of management skills and capacity of the other joint venture members;
 - to augment the contractor's expertise or performance capacity;
 - to access critical proprietary technology controlled by others e.g., patents, data rights, software;

STRATEGIC CONSIDERATIONS

- Why do Contractors enter into JVs (cont'd)?
 - to pool financial resources to meet up-front and start-up costs or to qualify for financing;
 - spread work geographically to maximize political support for the venturers or the program;
 - because the customer expresses a strong preference for a joint venture;
 - as a first step toward a merger.

Structuring the Joint Venture

STRUCTURING THE JOINT VENTURE CORPORATIONS

- Characteristics that may be advantageous or disadvantageous, depending on the circumstances
 - Limitation of liability
 - Double taxation
 - Case law has created fiduciary and other duties (e.g., care, loyalty) that officers and directors owe to shareholders that cannot be waived
 - Directors must personally participate in decisions that affect the business; they may not delegate their responsibility (by proxy or otherwise)
 - Documentation can be simple because state corporate statutes govern issues of ownership, management, termination, etc.

STRUCTURING THE JOINT VENTURE LIMITED LIABILITY COMPANIES

- Characteristics that may be advantageous or disadvantageous
 - Pass-through entity for tax purposes so there is no double taxation
 - Most state statutes provide wide latitude for parties to structure their relationship as they choose
 - profits and losses can easily be allocated according to formulas other than percentage of ownership
 - duties, including fiduciary duties of managers to owners can be waived
 - managers can delegate their responsibilities to others
 - company can be managed by its owners (members) or by separate managers
 - documentation is more detailed and can require more negotiations than with corporations, where parties depend on statutory principles to govern their relationship

STRUCTURING THE JOINT VENTURE

KEY PROVISIONS

- **Management**
 - Sound legal documentation is important but insufficient (i.e., it is rarely possible to provide for all eventualities)
 - Non-legal aspects such as shared vision and trust are important, if not essential
- **Dispute Resolution**
 - Government contractors must continue to perform whether or not there are disputes between them. Documents must provide for how contracts will be performed during dispute (e.g., defer to JV member with most expertise, managing member, or designated member)
 - Alternative dispute resolution mechanisms are common: escalation up corporate chain, mediation and arbitration
 - In Washington, DC region, contractors often submit disputes to “rocket docket” U.S. District Court for Eastern District of Virginia

STRUCTURING THE JOINT VENTURE

KEY PROVISIONS—CONTINUED

- **Termination**
 - Documentation should include a means of termination in addition to satisfactory completion of purpose, such as a formula for buying out departing joint venture party
 - Having a limited purpose clause is helpful
- **Intellectual Property**
 - Documentation should be clear about which intellectual property rights are made available to the venture and which are retained
 - Joint ownership of IP rights can be difficult and should be avoided where possible
 - Where joint venture creates IP, parties may want to obtain nonexclusive, royalty-free, perpetual rights to such IP
 - Without separate rights, a joint venture party may not be able to use outside of the venture, even after its termination, IP rights owned by the venture or other parties to the joint venture

Joint Ventures Under the FAR

JOINT VENTURES UNDER THE FAR

- Joint Ventures are a type of “contractor team arrangement”
 - FAR 9.601 defines such arrangements to include “an arrangement in which . . . [t]wo or more companies form a partnership or joint venture to act as a potential prime contractor”
 - FAR 9.602-9.604 recognize the benefits of JVs:
 - can enable contractors to complement each other’s unique capabilities; and
 - can provide USG the best combination of performance, cost, and delivery for the system/product being acquired
 - Basic requirement of all team arrangements is that “the arrangements are identified and company relationships are fully disclosed in an offer”—FAR 9.603

JOINT VENTURES UNDER THE FAR PRE-AWARD EFFORT

- Critical to identify in advance how key decisions will be made and which JV party, if any, has final say
- Greater care needs to be taken to agree in advance on the personnel/resources to be provided by each party
- Also need to address:
 - Who is responsible for writing what
 - How pre-award costs will be shared
 - Who will represent the JV in discussions/negotiations with USG and with what authority
- As a result, it is always preferable to have a teaming agreement in place prior to release of RFP

JOINT VENTURES UNDER THE FAR PROPOSAL EVALUATION

- Past Performance
 - JV often necessary because none of the parties have performed the complete requirement before
 - Agency may examine past performance of JV and/or individual JV parties, depending on terms of RFP
 - Agency has discretion to determine whether parties' experience makes up for JV's lack of relevant past performance

JOINT VENTURES UNDER THE FAR PROPOSAL EVALUATION—CONTINUED

- Past Performance (cont'd)
 - “It is well established that an agency may properly consider the relevant past performance history of the individual joint venture partners of the prime contractor in evaluating the past performance of a joint venture, so long as doing so is not expressly prohibited by the solicitation.” *DynCorp Int’l LLC; AAR Supply Chain, Inc.*, B-415873 *et al.*, Apr. 12, 2018, 2018 CPD ¶ 157.
 - “An agency properly may attribute the experience or past performance of a parent or affiliated company to an offeror where the firm’s proposal demonstrates that the resources of the parent or affiliate will affect the performance of the offeror.” *MetroStar Sys., Inc.*, B-416377.5 *et al.*, Apr. 2, 2020, 2020 CPD ¶ 135.

JOINT VENTURES UNDER THE FAR PROPOSAL EVALUATION—CONTINUED

- Past Performance (cont'd)
 - Proposed rule issued June 5, 2020 (FAR Case 2017-019)
 - Would amend FAR Parts 9 and 15 to require consideration of the past performance of joint venture parties when the joint venture itself does not have past performance:
 - *For offerors that are joint ventures, the evaluation shall take into account past performance of the joint venture. If the joint venture does not demonstrate past performance for award, the contracting officer shall consider the past performance of each party to the joint venture.*
 - Comments on proposed rule due August 4, 2020

JOINT VENTURES UNDER THE FAR PROPOSAL EVALUATION—CONTINUED

- Corporate Management
 - Agencies looking for transparency into JV to ensure that contract will be managed effectively
 - Proposal should identify JV management structure, performance responsibilities, and decision making processes
 - Focus on key personnel—show USG the faces they will be dealing with on a day to day basis & describe their authority/responsibilities

JOINT VENTURES UNDER THE FAR PROPOSAL EVALUATION—CONTINUED

- Recent Bid Protest Decisions Involving Joint Ventures
 - *ProSecure LLC*, B-418397 (Apr. 15, 2020)
 - Agency identified increased risk due to lack of past performance information for JV itself and its managing partner, even though other JV partner had past performance; GAO denied protest
 - *K2 Sols., Inc.*, B-417689 (Sep. 24, 2019)
 - Agency gave greater weight to past performance of JV's non-managing partner than to subcontractors; GAO denied protest
 - *ProTech Servs. USA, LLC*, B-417484 (July 19, 2019)
 - Agency excluded JV from competition because it did not have required facility security clearance, even though all four JV members held the required clearance; GAO denied protest

JOINT VENTURES UNDER THE FAR PRE-EXISTING CONTRACTS

- Because JV is a separate entity from JV parties, any transfer of pre-existing contracts from parties to JV triggers the Anti-Assignment Act, 41 USC 6305
 - Act prohibits transferring any Government contract or interest therein and provides that any such transfer annuls the contract
 - FAR Subpart 42.12 provides procedures for processing novation agreements
 - If USG refuses to novate contracts to JV, parties remain obligated to the USG under those contracts

JOINT VENTURES UNDER THE FAR PRE-EXISTING CONTRACTS—CONTINUED

- JV agreement should address parties' rights and responsibilities while novation request is pending
 - Party performance v. subcontract to JV
- Termination provisions in JV agreement should address parties' rights/liability in the event that USG refuses to novate
- Parties should take care to review the valuation of pre-existing contracts during due diligence, especially the valuation of claims

JOINT VENTURES UNDER THE FAR CONTRACT ADMINISTRATION

- Change Management
 - Problematic where one party's experience is with cost-type contracts, or where parties lack a complete understanding of the JV's scope of work
 - Need a unified process for identifying changes, communicating changes to project management for notice to USG, and tracking costs
- Duty to proceed with performance of the contract should be passed on to each JV party explicitly in JV agreement

JOINT VENTURES UNDER THE FAR CONTRACT ADMINISTRATION—CONTINUED

- Claims
 - Parties have no privity with the USG and therefore cannot assert or prosecute claims on their own
 - Any attempt by the JV to assign claims to the parties would likely violate the Assignment of Claims Act, 31 U.S.C. 3727
 - JV agreement must therefore provide for prosecution of claims in winding up provisions

JOINT VENTURES UNDER THE FAR

COST ACCOUNTING

- JV will often have to develop its own accounting system and disclosure statement
 - Must reconcile each party's accounting practices with JV's
- Whenever possible, seek an advance agreement regarding the treatment of certain costs per FAR 31.109

JOINT VENTURES UNDER THE FAR COST ACCOUNTING—CONTINUED

- Specific cost principles to be aware of:
 - 31.205-18 – IR&D costs incurred pursuant to a JV are allowable
 - 31.205-26 – Costs of materials, services, and supplies transferred between a party and the JV are allowable on the basis of cost incurred, not price
 - 31.205-27– Costs related to the planning or execution of the organization of a business are unallowable
 - 31.205-47 – Legal costs related to disputes between joint venturers are unallowable

JOINT VENTURES UNDER THE FAR ETHICS/COMPLIANCE ISSUES

- If JV is a partnership, applicable law provides that partners can be vicariously liable for the acts of other partners
- Suspension/Debarment—improper conduct of one JV party can be imputed to the other parties if:
 - The conduct occurred for or on behalf of the JV, or
 - The conduct occurred with the knowledge, approval, or acquiescence of the other parties
 - Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence
 - See FAR 9.406-5(c); 9.407-5

JOINT VENTURES UNDER THE FAR ETHICS/COMPLIANCE ISSUES—CONTINUED

- JV will need to develop its own ethics/compliance program
 - Must reconcile each party’s program and culture
 - Identify new reporting chains and ensure that each party’s systems refer JV matters back to JV
 - May need to develop new training if JV’s compliance program differs significantly from parties’ programs
 - JV compliance officers must be familiar with JV business practices (e.g., time charging, cost accounting, document retention, etc.)
- Parties will often warrant in the JV agreement that they are not aware of any violation of statute/regulation that will affect JV

JOINT VENTURES UNDER THE FAR ORGANIZATIONAL CONFLICTS OF INTEREST

- JVs expand the universe of “relationships with other persons” that can create an OCI
- “Impaired objectivity” OCIs—problematic where JV’s contract requires the exercise of judgment and one JV party (or its other segments/divisions) has a financial interest in the outcome of that judgment
- “Unequal access to information”—problematic where JV party has access to nonpublic information from performance of another government contract
- “Biased ground rules” OCIs—problematic where JV party was involved in development of the specifications for the procurement in which the JV is competing

Antitrust Issues

ANTITRUST ISSUES

- FAR Subpart 9.6 recognizes the benefits of JVs but does not authorize arrangements that violate antitrust laws
- JVs can potentially violate Sherman Act Section 1, usually analyzed under the “Rule of Reason”
 - May also violate Sherman Act Section 2 (if monopoly or attempted monopoly is involved), Clayton Act Section 3, and FTC Act

ANTITRUST ISSUES—CONTINUED

- FAR 3.303 requires agencies to report to DOJ proposals that evidence an antitrust violation
 - (b) “Any agreement or mutual understanding among competing firms that restrains the natural operation of market forces is suspect.”
 - (c) “Practices or events that may evidence violations of the antitrust laws include—
 - (7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance.”

ANTITRUST ISSUES—CONTINUED

- DOJ’s “Procurement Collusion Strike Force”
 - Announced in November 2019
 - Key component is to train individuals at all levels of the government contracting and funding process to better deter and detect antitrust crimes affecting government procurement, grant, and program funding
 - Contracting officers will be trained to identify “red flags of collusion”—bid rigging, agreements not to compete, etc.
- DOJ Antitrust Division Update – 2020
 - “Over a third of the Antitrust Division’s current investigations relate to public procurement.”

ANTITRUST ISSUES—CONTINUED

- JV or teaming arrangement with a competitor may be problematic when:
 - Few prime competitors are pursuing the bid
 - The team is broad in scope (i.e. reduces competition across a wide spectrum and not limited to a particular RFP/contract)
 - The team combines the two lowest cost firms or the two most technologically advanced firms capable of bidding
 - There are no or very little efficiencies (or benefits to the Government) to be gained from the team – i.e. a main purpose of the team is to eliminate competition

ANTITRUST ISSUES—CONTINUED

- DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors (2000) (the “JV Guidelines”)
 - Recognize need for competitors to collaborate and that some collaborations are pro-competitive
 - Recognize that certain ancillary restrictions can be necessary for the success of a collaboration
 - “Rule of Reason”: Focus on whether restriction is the purpose of the agreement, or whether restriction is ancillary to, and reasonably necessary to achieve, a pro-competitive purpose
 - Can’t just label a price-fixing agreement a “Joint Venture”
 - Safety Zones - presumption of no violation where market shares of collaboration and its participants together are no more than 20% of each relevant market affected

ANTITRUST ISSUES—CONTINUED

- **Pro-Competitive Effects**
 - Creation of new products & services by combination of unique technologies and skills
 - Increasing output and/or quality of existing products
 - Reduced costs (efficient distribution of technical and cost risk)
 - Sometimes necessary to ensure a source of supply
- **Document pro-competitive effects in “Whereas” clauses**
 - Increasing market share is not a pro-competitive effect, but underselling competition is
- **Anti-Competitive Effects**
 - Increases JV’s market power, i.e., ability to raise prices/lower output
 - Collusion & anticompetitive exchanges of information
 - Reduces ability/incentive to compete independently

THANK YOU

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