

4 CORNERS HUBZONE AND SMALL BUSINESS CONFERENCE

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FINDING SUCCESS WITH TEAMING

LEVERAGING YOUR STATUS



SPEAKERS

Karri Palmetier

Partner

Palmetier Law



Peter Ford

Partner

PilieroMazza PLLC



This presentation is for information purposes and does not constitute legal advice.

ABOUT PALMETIER LAW

Palmetier Law was founded to help small and medium-sized businesses navigate the maze of government contracting regulations. As a WOSB/SDVOSB, Karri understands the entrepreneurial spirit of a small business and appreciate the difficulties they face to enter the government contract market. With more than two decades of experience in the Air Force, major defense contractor and law firm, she brings a unique perspective as a trusted adviser to support companies.

My Primary Practice areas are:

- Small Business Requirements
- Data Rights and Patents
- Ethics Programs
- Contract Administration and Terms/Conditions
- Commercial Item Status
- Subcontract Management
- Non-FAR Contracts
- Compliance and Training

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ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

Our primary practice areas are:

- Government Contracting
- Small Business Programs & Advisory Services
- Labor & Employment
- Business & Corporate
- Litigation
- Intellectual Property & Technology Rights

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OVERVIEW

- Teaming Arrangements
- Joint Ventures
- All Small Mentor-Protégé Program

WHAT ARE TEAMING ARRANGEMENTS?

- What are Teaming Arrangements? FAR 9.6
 - Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
 - A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.
- Two sets of rules:
 - Teaming Arrangements – all companies. FAR 9.6
 - SBA regulations – if small business involved. 13 C.F.R. Part 121
- Types of arrangement
 - Prime/Sub – small business may be prime or subcontractor
 - Joint Ventures – separate legal entity
 - Mentor-Protégé – unique rules for small businesses

TEAMING ARRANGEMENTS

USG POLICY

- USG Policy is that they “may be desirable from both a government and industry standpoint in order to enable the companies involved to
 - Complement each other’s unique capabilities; and
 - Offer the government the best combination of performance, cost, and delivery for the system or product being acquired.”
- USG will recognize provided
 - Arrangement is identified, and
 - Relationship is fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective.

FAR 9.602

WHY SHOULD COMPANIES TEAM?

- Companies Benefit
 - Combined strengths and capabilities result in stronger proposals
 - Build past performance record (limited for evaluation)
- Small Businesses
 - Pursue larger contracts they can't perform on own
 - Grow and develop
 - Learn and build Past Performance
- Large Businesses
 - Meet subcontract goals
 - Pursue set-asides
- NOT for purpose of small business being a front so large business can obtain work set-aside

Small Business Prime Must Perform Work

TRAITS TO SEEK IN A PARTNER

- Common, mutually beneficial goals
- Complementary skills, experience and past performance
- Cost Competitive
- Willingness to invest
- Mutual trust that IP/confidentiality will be honored
- Willingness to respect one another and work through issues

Negotiation of Terms Will Highlight

TEAMING AGREEMENTS

- Prepare and sign a written agreement
- Purpose is an agreement to work together to win a contract
- To be legally enforceable, not just an agreement to agree
 - Define specific roles and responsibilities in preparing a proposal and allocation of work
 - Ideally – include copy of subcontract that will be signed
- If win, a written subcontract is required

WARNING: THE OSTENSIBLE CONTRACTOR RULE

- Subcontractor performs “primary and vital requirements” of a contract or order or
- Prime Contractor is unusually reliant on Subcontractor
- All aspects of the relationship between the Prime and Subcontractor are considered, including, but not limited to:
 - Terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work),
 - Agreements between the Prime and Subcontractor (such as bonding assistance or the teaming agreement), and
 - Whether the Subcontractor is the incumbent contractor and is ineligible to submit a proposal.
- Rule does not apply to a “similarly situated entity”

TIPS TO AVOID AFFILIATION

- Manage & control contract performance
- Do not rely on financial support from subcontractor
- Vary team members – especially if familial connection
- Maintain corporate formalities, arms-length transactions
- Hire own employees and use own facilities and equipment

NEW RULES FOR LIMITATIONS ON SUBCONTRACTING

- Same subcontracting limits as the prior rule:
 - 50% for services
 - 50% for supplies
 - 15% for general construction
 - 25% for specialty trade construction
- Different calculation: previously based on labor costs, now based on total price paid by the Government

SIMILARLY SITUATED ENTITIES

- Small businesses can now meet the performance requirement through their own work plus work subcontracted to “similarly situated subcontractors”
 - A similarly situated subcontractor is a firm that meets the same size/status requirements as the prime contractor for the project
 - Example: For an SDVOSB prime contract, only SDVOSB subcontractors would qualify as “similarly situated”
- Prime decides what NAICS code to apply to the subcontract

ADVANTAGES FOR JOINT VENTURES

- 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
- Joint venturing can help protect your most valuable asset

DISADVANTAGES OF JOINT VENTURES

- Lead Contractor gives up substantial control
- The participating contractors become jointly and severally liable to third parties for the acts of their joint venture partners, including criminal acts
- The Government may view the joint venture as lacking a clear point of contact, thus raising concerns regarding control, authority, and accountability

STRUCTURING OF A JOINT VENTURE

- Traditional Joint Venture
 - Partnership
 - Limited Liability Company
 - Corporation
 - Other considerations
 - Populated v. Unpopulated Joint Ventures
 - Limitations on Subcontracting

ALL SMALL MENTOR-PROTÉGÉ PROGRAM: BENEFITS OF MENTOR PROTÉGÉ

- Modeled after 8(a) Mentor-Protégé Program
- Mentor may provide protégé with various forms of financial, technical, and/or management assistance
- Mentor and protégé may enter into subcontracts
- Mentor may own up to 40% of the protégé
- Mentor and protégé are exempt from affiliation based on the assistance provided under the mentoring relationship
 - **KEY:** this means the mentor and protégé may form joint ventures for set-aside contracts
- Agencies may provide incentives to offerors utilizing a protégé

MENTORS

- Must be capable of providing mentoring
- Possess good character, not suspended or debarred
- May be large or small business
- May be protégé and mentor at the same time
- Non-profits are not eligible
- Generally, no more than one protégé at a time
 - But could have up to three protégés at one time if there is no adverse impact on any protégé
 - No limit on number of protégés in the life of the mentor

PROTÉGÉS

- Must be small under its primary NAICS code or small under a secondary NAICS code
 - If seeking approval under a secondary NAICS code, protégé must demonstrate prior experience and logical business progression in that code
- Generally, only one mentor at a time
 - SBA will approve a second mentor only if the second relationship pertains to an unrelated NAICS code and the protégé seeks to acquire specific expertise that the first mentor does not possess
- Only two SBA mentor-protégé relationships ever
- SBA may examine protégé's SDVOSB/WOSB self-certification as part of application process

PARTICIPATION PERIOD

- Maximum term is six years in one mentor-protégé relationship
 - Initial term of the Mentor-Protégé Agreement is for three years
 - One option for an additional three years
 - Parties must commit to one year – after that, either party may terminate the Mentor-Protégé Agreement upon 30 days notice
 - SBA must approve continuation of the relationship each year and can terminate at any time

HOW TO APPLY

- Electronic application only
 - Submitted to www.certify.sba.gov
- Applicants must:
 - Execute and submit a Mentor-Protégé Agreement consistent with SBA's rules
 - Register with SAM.gov
 - Complete online training module
 - Submit other documents to substantiate eligibility
- Depending on application volume, SBA may institute open and closed enrollment periods

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karri@palmetierlaw.com

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Peter Ford

pford@pilieromazza.com

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