

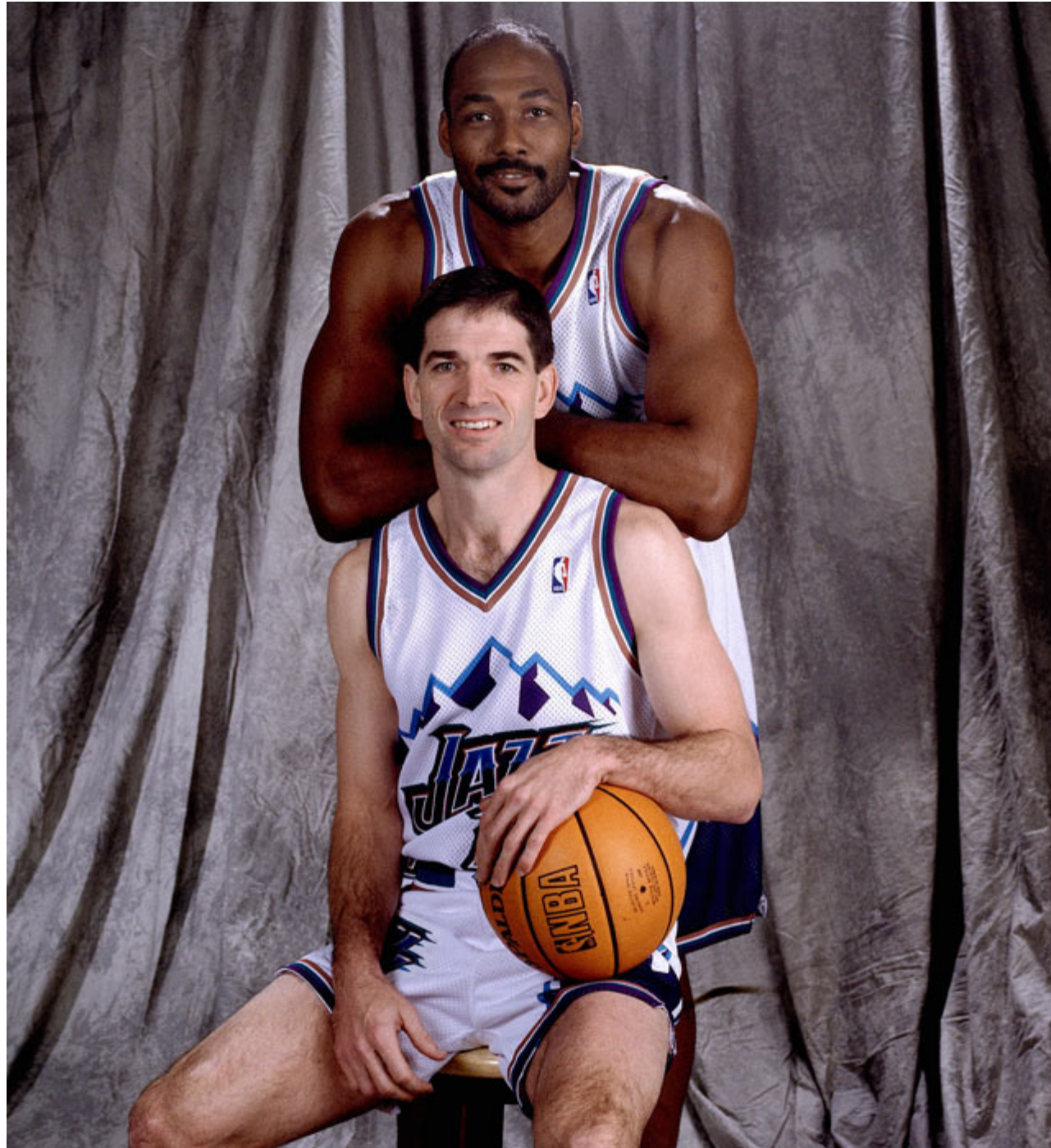


Teaming Arrangements

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Objectives

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Provide Basic Information on:

- WHAT is a contractor teaming arrangement
- WHY teaming arrangements may be beneficial
- HOW to use teaming arrangements consistent with SBA small business programs

Definition of Teaming

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- Companies form a partnership or **joint venture** to serves as a potential prime contractor

or

- A potential **prime contractor** agrees to have one or more companies act as its **subcontractor**

FAR 9.601(a)

Advantages of Teaming Relationships

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- Compliment each other's unique capabilities:
- Offer government best proposal resulting in potential for award
- Share or reduce risks
- Mitigate the effects of contract bundling
- Obtain experience in new markets/industries (larger procurements)
- Fill in gaps of past performance

Major Categories of Teaming Relationships

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- Joint Ventures
 - Small Business Set-Asides (SBSA)
 - Services Disabled Veteran Owned SBSA
 - 8(a)
 - HUBZone SBSA
 - Women Owned SBSA

- Traditional prime/subcontractor

Definition of Joint Venture

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“A joint venture is an association of individuals and/or concerns with interests in any degree or proportion 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 CFR 121.103(h)

Joint Ventures

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- Distinguishing Characteristics include:
 - Co-management
 - Sharing of profits and losses
 - Limited duration

Joint Ventures

- The joint venture entity cannot be awarded more than three contracts over a two year period, *generally*
- The same JV members may create additional new JVs and each new JV may be awarded up to three contracts
- **Caution:** Longstanding inter-relationships may lead to an “affiliation” between the JV members

Basic JV Requirements

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- Limitation on duration
- Must be in writing
- Conduct business under its own name
- May (but not required) be in the form of a separate legal entity.
- Must comply with applicable size standards to participate in SBA's small business set-aside programs

Size Standard Requirement

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- The general rule is that joint venture members are deemed “*affiliated*” for SBA size rules
- SBA regulations provide an exception to this rule for large or bundled contracts!

13 CFR 121.103(h)(3)

General Principles of Affiliation

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“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.”

13 CFR 121.103(a)

Affiliation

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- *Others may have power to control your business through:*
 - Common ownership/stockholders
 - Common management
 - Identity of Interest
 - Identical business interests
 - Newly organized company
 - ***Joint Venture arrangements***
(which may include “ostensible subcontracting”)

Why does Affiliation Matter?

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- *Small business definition:*

“A business entity, including all its *affiliates*, that is independently owned and operated, not dominant in the field of operation in which it is bidding on government contracts and qualified under the criteria and *size standards* identified in 13 CFR 121”

North American Industry Classification System

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- A NAICS code and corresponding size standard is assigned to every procurement
- The size status of a company is determined based upon the assigned code and standard:
 - Services NAICS codes based upon annual gross receipts (average over previous 3 years)
 - Supplies NAICS codes based upon number of employees of a company (previous 12 months)
- *Revenues or employees of all affiliates are combined to determine a company's size*

NAICS/Size Standard Examples

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<u>Item</u>	<u>NAICS Code</u>	<u>Size Std</u>
Paint	325510	500 employees
Eng. Services	541330	\$35.5M
Construction:	237310	\$33.5M
Construction:	238340	\$14M
A&E	541310	\$7M
Ammunition	325920	750 employees

Exceptions to Affiliation in JV's

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JV members are not considered affiliated under these conditions:

1. Bundled procurement of any dollar value,
2. Large procurements:

13 CFR 121.103(h)

Exceptions to Affiliation in JV's

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Bundling: (Any dollar value)

- Consolidating two or more requirements for supplies or services-
 - Previously provided or performed by small businesses under separate contracts
 - New solicitation that is likely to be unsuitable for award to a small business

13 CFR 125.2(d)

Exceptions to Affiliation in JV's

Large Procurements:

- Revenue based size standard; the estimated dollar value of the procurement (including options) exceeds half the size standard assigned to the procurement.
- Employee based size standard; the dollar value of the procurement (including options) exceeds \$10M

Exceptions to Affiliation in JV's

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If the JV members are not considered affiliated based upon SBA exceptions then:

- The combined revenues or employees of the JV members are not combined in determining size status, however
- Each JV member must be small under the assigned NAICS code and size standard

Affiliation Exception (Example 1)

Small Business Set-Aside	
Other Heavy and CE Construction NAICS code:	237310
Size Standard (Average Annual Receipts)	\$33.5M
Joint Venture combined receipts	\$45M
Company "X" AAR: \$10M	
Company "Y" AAR: \$15M	
Company "Z" AAR: \$20M	
Estimated value of contract:	\$20M
Half the size standard (\$33.5M divided by 2)	\$16.75M
<i>Conclusion: Estimated value of the procurement is greater than ½ the size standard therefore this is a "Large Procurement" (size affiliation exception applies)</i>	

Affiliation Exception (Example 2)

Small Business Set-Aside	
Tile and Terrazzo Contractors NAICS code:	238340
Size Standard (Average Annual Receipts):	\$14M
Joint Venture combined Average Annual Receipts:	\$15M
Company "X" AAR: \$3M	
Company "Y" AAR: \$5M	
Company "Z" AAR: \$7M	
Estimated value of contract:	\$1M
Half the size standard (\$14M divided by 2):	\$7M
Conclusion: Estimated value of the procurement is less than ½ the size standard therefore this is <u>Not</u> a "Large Contract" (<u>no</u> size affiliation exception)	

Affiliation Exception (Example 3)

Small Business Set-Aside	
Paint/Coating Manufacturing NAICS code:	325510
Size Standard (Number of Employees):	500
Joint Venture combined number of employees:	600
Company "X": 200	
Company "Y": 200	
Company "Z": 200	
Estimated value of contract:	\$5M
Exception threshold:	\$10M
<i>Conclusion: Estimated value of the procurement is less than the exception threshold of \$10M therefore this is <u>Not</u> a "Large Contract" (<u>no</u> size affiliation exception)</i>	

Joint Ventures/Affiliations Summary

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- *General Rule:* Members of a Joint Venture are deemed “affiliated” for SBA size rules
- *Exceptions:* Certain procurements:
 - Bundled procurements of any value
 - Procurements with employee based size standards greater than \$10M
 - Procurements with annual receipts based size standards where the estimated value of the procurement is greater than $\frac{1}{2}$ the size standard.

Joint Ventures for 8(a) contracts

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- SBA must approve the JV agreement
- 8(a) participant must be the managing partner and own at least 51% of the JV entity.
- 8(a) firm must perform at least 40% of the work performed by the joint venture
- The JV entity must comply with the Limitations on Subcontracting

13 CFR 124.513

Joint Ventures for 8(a) contracts

- 8(a) firm receives profits commensurate with work performed.
- Affiliation rules apply for members of the joint venture:
 - For large procurements all joint venture members must be small and at least one partner must be $\frac{1}{2}$ the size standard for the procurement
 - Exception for approved Mentor-Protégé agreements

SBA's Mentor Protégé Program

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*SBA's M-P program is for 8(a) only at this time:
(NDAA 2013 includes other SB programs...)*

- M-P approval made at SBA headquarters with cooperation of the protégé's SBA district office
- A resulting JV is approved at the protégé's SBA district office
- May result in a JV with a large business
 - *Size regulations deem such JV as a small business for any government procurement provided the protégé qualifies as a small business for the applicable NAICS size standard*

Mentor Protégé Programs

(NDAA 2013: Forthcoming Changes!)

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- Department of Defense:
http://www.acq.osd.mil/osbp/doing_business/index.htm
- Department of Homeland Security:
http://www.dhs.gov/xopnbiz/smallbusiness/editorial_0716.shtm
- Department of State:
<http://www.state.gov/m/a/sdbu/c14690.htm>
- Department of Energy:
http://smallbusiness.doe.gov/Small_Business_Programs/Mentor-Protege/mentor-protege.html
- Department of Treasury:
<http://www.ustreas.gov/offices/management/dcfo/osdbu/mentor-protege>

JV's for Hubzone Contracts

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- All members must be certified Hubzone firms
- The JV entity/HUBZone subcontractors must comply with the Limitations on Subcontracting;
 - 50%
 - Specific guidelines for construction
- All members must be small. Affiliation waiver for large procurements if contract estimated value meets size criteria.
- Non-manufacturing waivers are not granted for HUBZone procurements

13 CFR 126.616

JV's for SDVOSB Contracts

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- At least one member must be SDVOSB
- All members must be small. Affiliation waiver for large procurements if contract estimated value meets size criteria
- The JV entity/SDV subcontractors must comply with the Limitations on Subcontracting
- Must operate under a JV Agreement:
 - SDVOSB is the managing venturer
 - Employee of SDVOSB is the project manager
 - 51% of net profits distributed to SDVOSBs

13 CFR 125.15

JV's for WOSB Contracts

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- At least one member must be WOSB
- All members must be small. Affiliation waiver for large procurements if contract estimated value meets size criteria
- The JV entity must comply with the Limitations on Subcontracting
- Must operate under a JV Agreement:
 - WOSB is the managing venturer
 - Employee of WOSB is the project manager
 - 51% of net profits distributed to WOSBs

13 CFR 127.506

Prime/Subcontractor

- *Government deals primarily with the prime contractor on proposal evaluations and contract administration*
 - Proposal evaluation: Past performance of subcontractor *generally* not weighted as high as that of the prime contractor
 - Contract Administration: Prime contractor is responsible for subcontract performance

Prime/Subcontractor

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- *Jobs Act of 2010: (some protection to SB Subs):*
 - Non or late payment to subcontractors
 - Not utilizing subcontractors identified in proposal
 - Annual performance rating of prime

(FAR updates forthcoming)

Prime/Subcontractor

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- Full and Open Competition:
 - Large Business prime contractor required to submit small business subcontracting plan (\$650K, \$1.5M for construction) Maximize SB participation!

- Small Business Set-Asides:
 - Prime contractor must comply with the Limitations on Subcontracting
 - Beware of Ostensible Subcontracting!

Limitations on Subcontracting

Prime contractor/JV must perform a specific portion of the contract requirements

Applicable to SBSA , WOSB and 8(a) contracts

(2013 NDAA revises %'s. FAR revisions forthcoming)

Services:

Provide 50% of personnel costs

Supplies:

Provide 50% of cost of manufacturing excluding materials

General

Construction:

Perform 15% of cost of the contract with own employees, excluding materials, profit, fee.

Special Trade

Construction:

Perform 25% of cost of contract with own employees, excluding materials, profit, fee.

Ostensible Subcontractor

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- A subcontractor is an “ostensible subcontractor” if:
 - *The subcontractor performs the primary and vital requirements of the contract, or*
 - *The prime contractor is unusually or unduly reliant upon the subcontractor*
- A prime contractor and its ostensible subcontractor *are treated as a joint venture, and therefore affiliates, for size determinations*

Ostensible Subcontracting

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Possible factors:

- Language used in Teaming Agreement
- Proposal wording
- Possible Concerns:
 - Reliance on bonding
 - Who is in control/managing the contract
 - Performance of vital requirements
 - Role in pursuit of the contract
 - Whether subcontractor was the incumbent

Size Protests

- *Who can initiate a size protest?*
 - Unsuccessful offeror
 - Contracting Officer
 - SBA
 - Other interested parties (large business where only one concern submitted an offer)
- *Whom can a size protest be filed against?*
 - Only against the apparent successful offeror

Size Protests

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- *When can a size protest be filed?*
 - By close of the 5th business day after bid opening (sealed bids) or notification of apparent successful offeror (negotiated acquisitions)
- *Where should a size protest be filed?*
 - With the contracting officer who then must forward the protest to the SBA Government Contracting Area Office in which the HQs of the protested firm is located

Size Protests

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- *Who/When makes the size determination?*
 - The SBA
 - Within 15 business days
- *Is the SBA decision final?*
 - Yes, unless appealed to the Office of Hearings and Appeals (OHA)

13 CFR 121.1001-1010

13 CFR 121.1101-1103

Conclusions/Points to Remember

- The specific goals and objectives of the business relationship influence the type of teaming arrangement that is most advantageous to your firm
- Teaming arrangements may affect small business size status under SBA's rules of affiliation
- Teaming arrangements are business relationships with resulting legal implications

Teaming Agreements

Put it in Writing!

- Purpose and scope of agreement
- Joint Ventures are required to be in writing with specific regulatory terms
- Establish roles in proposal preparation and contract performance
- Authorized representatives
- Management and performance clarity
- Handling of proprietary data
- Procedures for disputes
- Termination provisions
- FAR clauses
- Etc (use your attorney)

Relevant Websites

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- SBA
www.sba.gov
- Hubzone
www.sba.gov/hubzone
- 8(a)
www.sba.gov/8abd
- Guidebook for Facilitating Small Business Team Arrangements:
www.acq.osd.mil/osbp/resources/teaming.pdf

Regulations

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Code of Federal Regulations (CFR)

<http://ecfr.gpoaccess.gov>

Size:	13 CFR Part 121
8(a) & SDB:	13 CFR Part 124
Govt Contracting Programs:	13 CFR 125
HUBZone Program:	13 CFR 126
SDV Programs:	13 CFR 125.8-28
WOSB Programs:	13 CFR 127

Regulations

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Federal Acquisition Regulations (FAR)

<http://farsite.hill.af.mil>

Size:	FAR 19.1
8(a) & SDB:	FAR 19.8
Govt Contracting Programs:	FAR 19
HUBZone Program:	FAR 19.13
SDV Programs:	FAR 19.14
WOSB Programs:	FAR 19.15



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