

Top Ten Considerations for a Joint Venture in a Government Procurement

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For government contractors with diverse strengths and shared business objectives, joint ventures—known formally as “contractor team arrangements” (CTA) in the Federal procurement context—can provide significant opportunities for successful collaboration. But the valuable synergies of a joint venture must be managed properly in order to avoid partner disputes that can wreak havoc on the partners’ finances and reputation.

Federal Acquisition Regulation (FAR) Subpart 9.6 states that it is the Government’s policy to “recognize the integrity and validity of contractor team arrangements.” FAR 9.603. However, as we discuss below, this policy comes with caveats that could impact the way parties structure and operate their CTAs for specific procurements.

Below are the top ten considerations when forming a CTA to increase the chances of success and minimize conflict between the partners.

1. Choose the Right Partner.

At its core, a CTA is only as strong as its partners, and joining forces with the wrong partner can lead to disastrous results. When choosing a CTA partner, consideration must, of course, be given to a potential partner’s technical skills and areas of expertise with respect to the specific opportunities being pursued. Contractors should also consider the strength of the potential partner’s general business acumen. How strong is the leadership team? Is the potential partner financially sound? Finally, contractors should conduct due diligence concerning the potential partner’s corporate culture and overall industry reputation to ensure that the partnership values align. At a minimum, contractors should check with the System for Award

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Management (SAM), www.SAM.gov, to determine whether a potential team member is currently suspended or debarred.

2. Identify and Agree on a Clear Division of Labor.

One of the key benefits of a CTA is that it allows two partners with different strengths and areas of expertise to join forces. In order to avoid costly and time-consuming disputes, partners should decide in advance on distinct roles for each member. The partners should expressly memorialize their division of labor in a CTA Agreement in order to maximize the strength of the partnership and minimize disputes down the road.

3. Establish Clear Roles for Agency Interface.

Agency contracting and program officials typically prefer to deal with as few contractor personnel as possible, with the so-called “single belly-button” approach^{3/4} involving a single point of contact (POC)^{3/4} as the gold standard. While this may not always be feasible or desirable, contractors should figure out what works best for their team while keeping POCs to a minimum.

Perhaps most important, the CTA Agreement should expressly address which partner has responsibility for communicating with the agency customers on particular issues. For example, one member might be responsible for contracting/billing communications, and another for technical matters and program-office interface. Each member must understand and abide by its assigned role. Finally, the partners should inform the agency customer as to which partner has authority and responsibility for these communications and ensure that the agency is kept up to date of any changes in this area.

4. Give Careful Consideration to the Management Structure.

CTA partners should discuss and agree on the overall structure for managing operations of the CTA. Examples of key items for consideration include composition of the Management Committee and election of its members, formal meeting requirements, and whether and to what extent certain issues require approval of both partners.

CTA Agreements should also implement procedures for adequately documenting compliance with the formalities of the agreement in a way that is not unduly burdensome. As many contractors know, ignoring the formalities of a CTA Agreement can be worse than not having rules at all—feasibility should be a key consideration when it comes to adopting formal processes.

5. Address Employee Issues Carefully.

For many CTAs, employees can be among the most valuable assets. In order to minimize disruption to CTA operations and avoid expensive and protracted disputes, the CTA partners should address and agree on key issues affecting their employees well in advance of commencing work. Important considerations might include whether employees working on the CTA should be employed by the CTA and/or individually by the partners and whether a non-solicitation provision is necessary. How the CTA is populated can significantly affect the indirect rates that can be proposed to the agency customer, which could materially affect the CTA’s cost/price

competitiveness, as well as the profitability of individual team members. Therefore, the parties must critically assess the arrangements for managing and allocating employees.

6. Protect the CTA's Intellectual Property.

Throughout the course of performance, the CTA may develop valuable intellectual property. In addition, CTA members may bring their own prior intellectual property to the team. Careful consideration should be given to what constitutes intellectual property, confidentiality requirements and agreements on protection from improper disclosure, and the ownership of such property both during and after completion/termination of the CTA.

7. Agree on a Process for Dispute Resolution.

Though every business partner hopes for a conflict-free relationship, business disputes can often arise during the course of CTAs. The partners should agree on and document the process for resolving disputes in the CTA Agreement. This might include agreeing on the forum for disputes (litigation v. arbitration), whether and to what extent informal notice of default should precede the commencement of formal litigation, and how the parties communicate or interact with key Government personnel while the dispute is being resolved.

8. Specify the Process for Dissolution.

The joint venture partners should prescribe the dissolution process clearly in the CTA Agreement. Key aspects of dissolution might include dissolution triggers, the approach to valuation of the CTA interests, and agreements concerning the parties' leeway to participate in follow-on competitions. To the extent that the CTA Agreement is clear, the parties may be able to dissolve without judicial intervention—thereby avoiding significant cost and delay.

9. Be Transparent to the Government.

The FAR policy to recognize and validate CTAs is conditioned transparency—the extent to which the organization and company arrangements are “fully disclosed” to the agency. FAR 9.603. Agencies want to know who they are dealing with and, if things go wrong (either during a competition/protest or during performance), they likely will not react well to surprises as to the nature and composition of a CTA. Moreover, during competition, agency evaluators seem to prefer greater detail when it comes to offerors' descriptions of arrangements between or among CTA members. Finally, maximum transparency will make it easier for the agency to assess the CTA's present responsibility for award. The greater the specificity and depth of the information which can be shared comfortably with the Government, the better.

10. Form a Complementary Team.

The FAR generally considers CTAs desirable only if each team member **complements**, rather than **replicates**, “each other's unique capabilities.” FAR 9.602(a)(1). If CTA members have identical capabilities, the concern would be that the arrangement might improperly reduce competition. This is reflected in the stipulation that, “[n]othing in [Subpart 9.6] authorizes contractor team arrangements in violation of antitrust statutes” FAR

9.604. While some overlap in capability would likely not create concern, general congruence of capabilities should be avoided and CTA agreements and proposals for specific procurements should clearly delineate the differing capabilities that each team member brings to the project.

In conclusion, CTAs can provide significant advantages to both contractors and agencies. When established strategically and executed properly, CTAs can offer unique opportunities for contractor success while providing the best value for agency needs. It's not rocket science but rather common sense to plan for and structure CTA agreements to tap into the Federal Government's policy of welcoming them. Wiley regularly assists contractors with drafting and negotiating CTA Agreements, ensuring contract compliance and litigation involving joint venture and CTA disputes.