SCHOONOVER + MORIARTY LLC

INCREASING COMPETITIVENESS

MENTOR/PROTÉGÉ, JOINT VENTURE, AND TEAMING RELATIONSHIPS

It's great to have friends.

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This presentation is not intended to be legal advice. If you have specific questions, please contact a government contracts attorney.

OVERVIEW

- **Mentor-protégé program**
  - **Overview**
  - **Duration, limitations, eligibility**
  - **Mentor-protégé agreements**
- **Joint ventures**
  - **What is a joint venture?**
  - **Why are joint ventures helpful?**
  - **Drawbacks and pitfalls**
  - **Work share requirements**
  - **Joint venture agreements**
- **Prime/sub teams**

But first, a quick plug:

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MENTOR-PROTÉGÉ PROGRAM

MENTOR-PROTÉGÉ PROGRAM

- **Overview**
  - Mentor-Protégé Program is a way for one business (large or small) to provide small business developmental assistance
  - Improve the protégé's ability to compete for federal government contracts
  - Open to all small businesses
- **Administration**
  - 8(a) "rolled into" ASMPP → MPP
  - The SBA administers the Mentor-Protégé Program
- **Application**
  - Applicants must develop a mentor-protégé agreement and submit it to the SBA for approval.
    - Agreement details developmental assistance items

MENTOR-PROTÉGÉ DURATION

- Relationship lasts for three years but can be extended for an additional three years.
  - Relationship may last for up to six years
- SBA reviews the relationship annually
  - During the 30 days prior to annual anniversary, protégé must report: technical/management assistance; loans or investments made by mentor; subcontracts between the two; federal contracts awarded to the pair as a joint venture; narrative describing the success of assistance provided by mentor; mentoring services by category and hours

MENTOR-PROTÉGÉ LIMITATIONS

- Protégé can usually only have one mentor at a time
  - Protégé can have a second simultaneous one if it doesn't conflict with the first (*e.g.*, a second NAICS code or protégé wants expertise that the first mentor doesn't have)
  - **Protégé can only have two mentors during its lifetime**
- Mentors usually have one protégé at a time, but can have up to three
  - Additional relationships can't prejudice the others
  - No lifetime max
- A firm can be a protégé and mentor at the same time, if there's no conflict (*e.g.*, different NAICS codes)

ELIGIBILITY

- **Protégés**
  - Must be organized for profit
  - Must qualify as small in its primary NAICS code (or identify a secondary NAICS code that it is seeking to develop)
    - For a secondary NAICS code, must have some pre-existing capabilities and experience
    - Affiliation rules apply
  - Not required to have a particular socio-economic designation

- **Mentors**
  - Must be organized for profit
  - Must demonstrate that it can provide the assistance set forth in the mentor-protégé agreement
  - Must possess good character
  - Not debarred or suspended federal contractor
  - Can impart knowledge through experience or knowledge of general business operations

- **Small business development**
  - The mentor responsible for providing the assistance items with the mentor-protégé agreement
- **Affiliation exceptions**
  - A mentor and protégé will not be affiliated for engaging in the SBA approved assistance items.
- **Mentor-protégé joint venture**
  - A compliant mentor-protégé joint venture will qualify for *any* small business set-asides that the protégé member qualifies.
    - ***Regardless of the mentor firm's size!***
- **Equity investment**
  - Mentor can make 40% equity investment to provide capital for protégé

TYPES OF ASSISTANCE

- Technical/Management
  - Accounting, marketing, manufacturing, strategic planning
- Financial
  - Equity investments and loans
- Subcontracting
  - Mentor to protégé or vice versa
  - Joint ventures
- International Trade Education
  - Finding markets
- Business Development
  - Strategy and partnership opportunities
- General Administrative
  - Human resources
  - Security clearance support

MENTOR-PROTÉGÉ AGREEMENT

- Form of agreement is largely dictated by SBA
- Core of agreement is listing:
  - Protégé's needs
  - Assistance that mentor will provide to meet those needs
  - Timeline for providing identified assistance
  - Metrics: how will the parties determine that the assistance has been successfully given
- Specificity and details are key in this section

MENTOR-PROTÉGÉ JOINT VENTURES

- Mentor-protégé relationship does not establish an automatic joint venture
- Mentor-protégé joint venture must still abide by:
  - Joint venture work share requirements
  - Applicable limitation on subcontracting
- SBA must approve the mentor-protégé agreement before the joint venture can submit an offer for a federal government contract
  - Otherwise, SBA may find the venturers affiliated

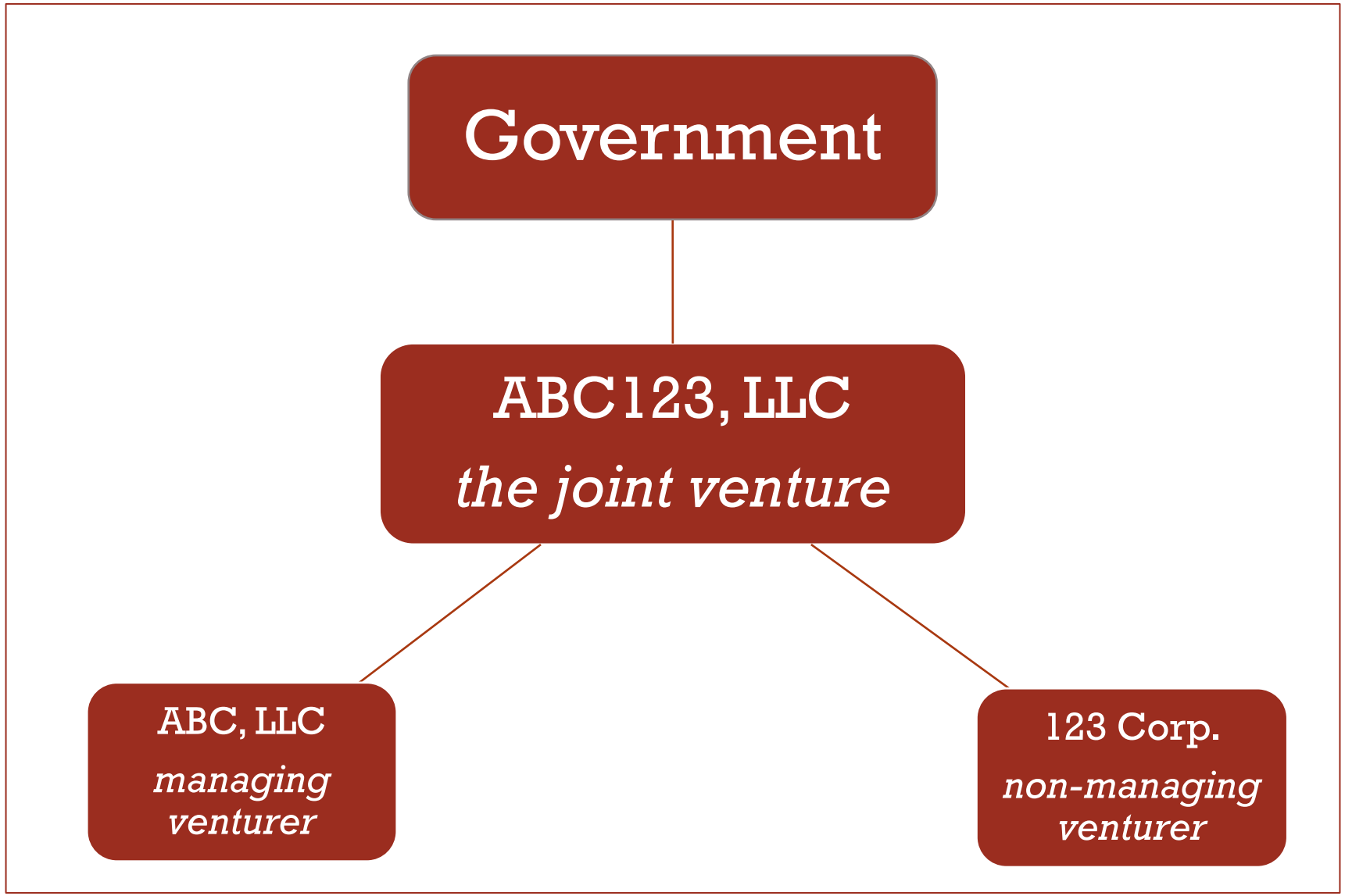
IMPORTANT CONSIDERATIONS

- **Protégé**
  - This is a great opportunity to learn from a seasoned company
  - Ensure compatibility
    - Limited to two mentors in a lifetime
    - Might try subcontracting with the company before beginning the mentor-protégé relationship
- **Mentors**
  - Opportunity to assess its own abilities and areas for improvement
  - Chance to make investments in younger companies
- **Don't treat the relationship merely as an avenue for joint venturing**

JOINT VENTURE RELATIONSHIPS

WHAT IS A JOINT VENTURE?

- **According to the SBA, a joint venture is a separate legal entity of limited purpose and duration.**
- Let's break that down…
- **"Separate legal entity"**
  - The joint venture is an independent businesses (e.g., corporation, LLC, LLP, etc.)
  - The founding businesses are members/owners
- **Limited purpose**
  - Pursue specific federal contracting opportunities
- **Limited duration**
  - They are not ongoing concerns
  - Spoiler Alert: The SBA's rules on duration are very strict


Government
ABC123, LLC
the joint venture
ABC, LLC
managing venturer
123 Corp.
non-managing venturer

- **In a word**: collaboration.
- Joint ventures allow two small businesses to work together to pursue federal jobs that otherwise would have been out of reach.
- **Practical support**
  - The joint venture structure allows businesses to:
    - Pool resources
    - Diversify offerings
    - Take on larger projects
    - Avoid possible affiliation
    - Leverage security clearances
    - Share past performance

WHY ARE JOINT VENTURES HELPFUL?

- **Preserve small business status**
  - Compliant joint ventures receive an exception from affiliation
    - Only two types of small business joint ventures
  - Exception only lasts two years
    - "Once a joint venture receives a contract, it may submit additional offers for a period of two years from the date of that first award." 13 C.F.R. § 121.103(h).
    - Submitting a proposal more than 2 years after first contract award will result in affiliation of the joint venture members
      - Solution: create a new joint venture
- **Provides alternative to subcontracting**
  - Must still comply with limitation on subcontracting and performance of work requirement
- **Legal mechanism for "co-prime" contractors**
  - Joint ventures are a way for multiple companies to work at the prime contractor tier.

GREATER THAN THE SUM OF ITS PARTS

- **Past performance**
  - SBA's regulations require the agency to consider the past performance of the JV and its constituent members as part of the evaluation
  - Small business can now also rely on its performance as a JV member, to some extent
- **Equipment, personnel and facilities**
  - Ventures can pursue larger work as a duo with shared resources and experience
- **Facility clearances**
  - SBA regulations allow either the joint venture's clearance, or individual member clearances to satisfy security clearance requirements.

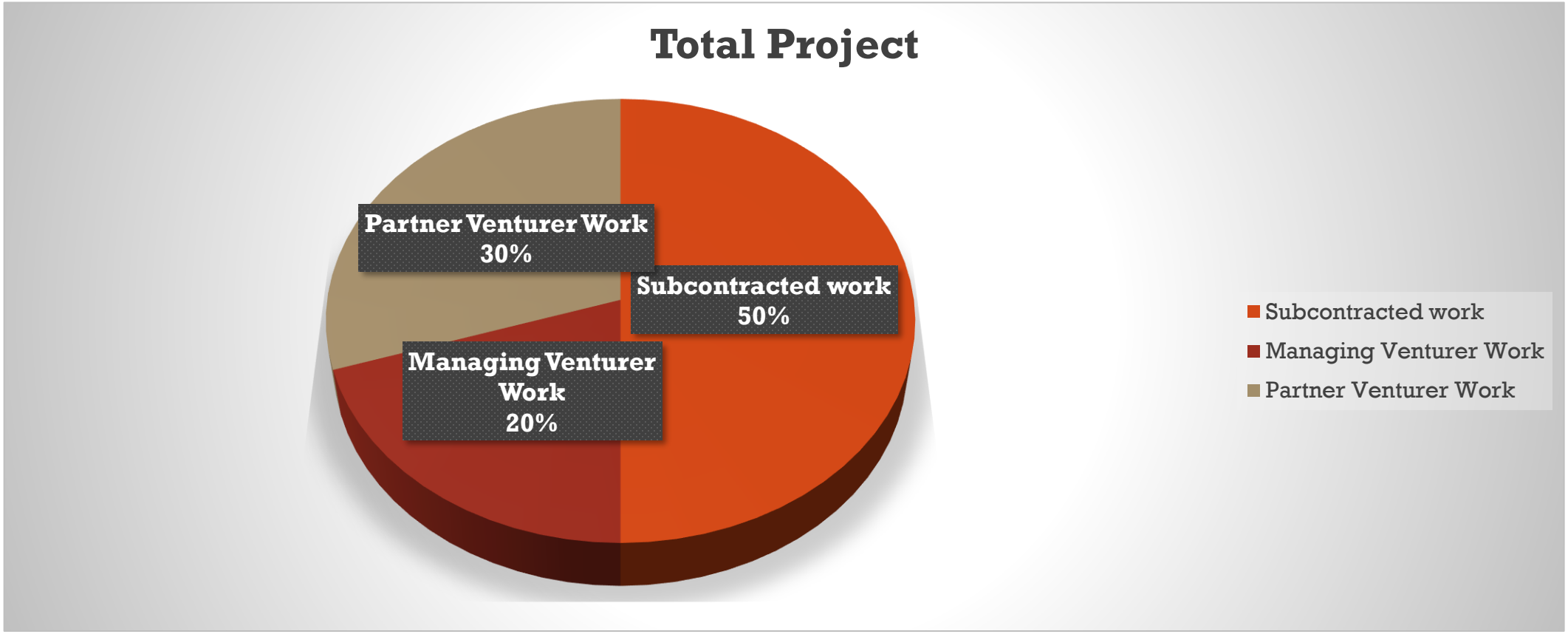
DRAWBACKS AND PITFALLS

- Timing
  - Don't wait! Lots of Paperwork
    - EIN/TIN, DUNS, and SAM registration – before bidding
    - In some instances, joint venture agreement must be approved to bid
  - Non-compliant joint venture agreement
  - SBA's regulations have detailed requirements
  - If joint venture agreement doesn't comply, it does not get the benefit of the affiliation/size exception
- Performance requirements

PERFORMANCE REQUIREMENTS

- **Limitation on subcontracting**
  - Applies to virtually all small business set-aside contracts
  - Limits the amount of a project that may be subcontracted
    - Measured as percentage of total dollars paid by the government
    - Different limits for different industries
- **Performance work requirement**
  - Applies only to small business joint ventures
  - The managing venturer must perform at least 40% of the work performed by the joint venture

HOW DO THESE REQUIREMENTS INTERACT?



JOINT VENTURE AGREEMENTS

- **Get it in writing!**
  - All joint ventures must have a written joint venture agreement
  - The agreement must also be executed by each of the parties
- **Different regulations, but (almost) the same requirements**
  - To qualify as an 8(a), SDVOSB/VOSB, EDWOSB/WOSB, HUBZone, or mentor-protégé joint venture, the joint venture agreement must include specific requirements dictated by the SBA
  - Regulations for 8(a), SDVOSB/VOSB, EDWOSB/WOSB, HUBZone are largely identical
  - Regulations for mentor-protégé joint venture agreements have slight differences
    - Financial statements vs. performance-of-work statements

"UNIVERSAL" SOCIO-ECONOMIC AGREEMENT REQUIREMENTS

- 8(a)/SDVOSB/WOSB/HUBZone/protégé must own 51%
- 8(a)/SDVOSB/WOSB/HUBZone/protégé = managing venturer
  - Responsible for the day-to-day management and administration
  - Partners may participate in decisions "as is commercially customary"
- Employee of the managing venturer = Responsible Manager
  - Has the "ultimate responsibility for performance of the contract"
  - Need not be a current employee when offer submitted if letter of intent
  - Cannot be an employee of the mentor
- Venturer must receive profits commensurate with work performed OR a higher percentage agreed to by the parties

"UNIVERSAL" SOCIO-ECONOMIC AGREEMENT REQUIREMENTS

- **Purpose** – what is the joint venture designed to do?
- **Bank account** – requiring the signature or consent of all parties for payments to venturers for work performed
- Itemized list with value of **major equipment, facilities, and resources**
- Responsibilities of the parties
  - **Negotiation** of the contract
  - **Source of labor**
  - **Contract performance** – including how they will meet the performance of work requirements
- **Obligating all members to perform**
- **Records**
  - Accounting and administrative records kept at the MV office
  - Final original records retained by the MV
  - **Quarterly financial statements to SBA** within **45 days**
  - **Project end profit and loss statement to SBA** within **90 days**
- **Certification of compliance**

Must have compliant agreement for each bid!

ADDENDUMS

Key part of the agreement

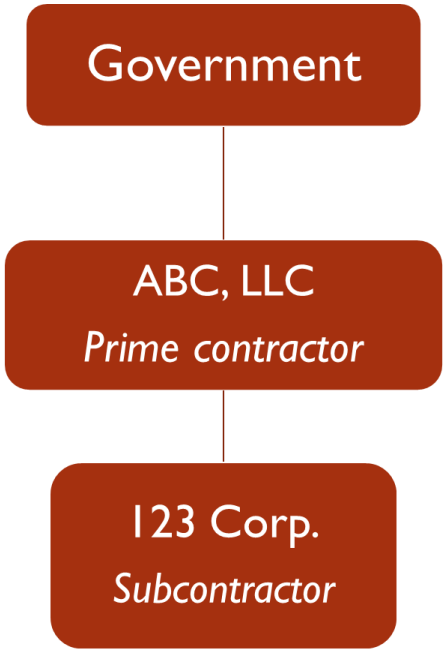
DON'T FORGET THE ADDENDUM

8(A) JOINT VENTURES ARE UNIQUE

- 8(a) JVs up for sole source awards must be approved **prior** to award
  - 8(a) must "lack the necessary capacity to perform"
  - Agreement must be "fair and equitable" and of "substantial benefit" to 8(a)
  - **Denial** if the 8(a) brings little to the table other than 8(a) status
  - Amendments must be approved also
- Approval no longer required for competitive awards BUT eligibility will be determined at the time of award

PRIME/SUB TEAMS

PRIME/SUB TEAMS



- **Quintessential contracting relationship**
  - Prime is awarded the contract, then subcontracts out a portion of that work to one or more subcontractors
  - Prime has privity of contract with the government, and is responsible/liable for performance of the contract
  - Prime/Sub Teams are ultimately governed under state law, but important principles apply

STRUCTURAL COMPARISON

- **Prime Contractor/Subcontractor**
  - Only prime in "privity" with the Government
  - No new legal entity created
  - Subcontractor paid on a pre-determined basis.
  - Limitation on subcontracting considerations

- **Mentors**
  - New legal entity (split ownership)
  - Only joint venture entity in "privity" with the Government
  - Venturers split profits and losses
  - Workshare *and* limitation on subcontracting considerations

TEAMING AGREEMENT

- **Agreement between the (prospective) prime and the (prospective) subcontractor to pursue a specific opportunity as a team**
  - Entered before the prime contract and subcontracts are awarded
  - Lock in each party to the relationship
  - Define their roles on the team and their work in developing the proposal
    - Ensure compliance with requirements at the outset
- **FAR does not specifically require TAs**
  - Agencies/specific solicitations might require them
- **Possible Enforcement Challenges**
  - Some courts have held non-specific teaming agreements to be unenforceable agreements to agree.

- **Potential TA terms**
  - Identification of parties and their roles
  - Identification of solicitation/opportunity being pursued
  - Division of responsibilities relating to proposal preparation
  - Anticipated areas of performance under contract
    - Avoid illusory agreements
  - Exclusivity, non-disclosure, and termination provisions
  - Key subcontract provisions (limitation on subcontracting compliance, OCI/ethics, FAR flowdowns, etc.)

SUBCONTRACTS

- **Awarded by the prime contractor to the subcontractor <u>after</u> the prime contract is awarded**
  - Can be negotiated in advance
  - Replaces/supersedes the Teaming Agreement
- **Detailed provisions relating to subcontractor performance**
  - Scope of work
  - Deliverables/performance benchmarks
  - Payment provisions
- **More common subcontract provisions**
  - FAR flowdowns; ethics/OCI provisions
  - Limitation on subcontracting compliance
  - Non-disclosure, non-compete, and non-solicitation
  - Service Contract Act compliance
  - Changes (who/how authorized)
  - Dispute resolution (internal and external)
  - Termination (convenience and default)

TAKE AWAYS

- **Mentor-protégé program offer significant benefits**
  - Small businesses can receive significant mentoring from established and experienced businesses.
  - The program offers affiliation protection, joint venturing possibilities, and capital raising opportunities.
- **Joint ventures are a powerful tool**
  - Allow two small businesses, or a mentor and its protégé to collaborate to target larger projects.
  - Provide affiliation exceptions and limitation on subcontracting compliance advantages.
  - **Must have a compliant agreement for each opportunity!**
- **Prime/subcontractor teams**
  - Although firms to customized solution for each procurement.

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