

Key Legal Considerations in Setting Up Your Business to Grow and Succeed

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Formation: Typical Considerations

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- Tax Implications (*e.g.*, income tax, self-employment tax, retirement plans, fringe benefits)
- Limited liability
- Management
- Ease of formation
- Degree of formality/complexity
- Ability to raise capital (investors)
- Ability to transfer ownership



FORM OF ENTITY

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- ❑ Sole Proprietorship
- ❑ Partnership – General and Limited
- ❑ Corporations – C Corp and S Corp
- ❑ Limited Liability Company
- ❑ Other Formation Options



Sole Proprietorship

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- ❑ Business run by its owner
- ❑ Owner = Business → No legal distinction
- ❑ Owner has all profits and losses of the business
- ❑ Owner controls the operations
- ❑ Owner is liable for the operations
- ❑ Taxes are paid by the owner
via personal tax return



Partnerships

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- General Partnership – Two or more owners that manage partnership and share profits/losses
- Limited Partnership – General partner manages, limited partners invest and share in profits/losses. Limited partners can limit their liability as “passive” investors.
- Partners control business and generally are liable for business
- Taxes are paid by the partners via personal tax returns
- Loss of partner can affect business continuity
- May use agreements to lessen uncertainty



Corporations

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- C Corporation – separate taxable entity
- S Corporation – owners elect to be taxed like a partnership
- Limited liability – legal distinction between business and owners
- Articles of Incorporation/Bylaws
- Management



Shareholders →

Owner/Elect Board

Board of Directors →

Set Policies/Elect Officers

Officers

Operate Company

Limited Liability Company

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- ❑ Formed by “members”
- ❑ Managed by its members OR manager(s)
- ❑ Articles of Organization/Operating Agreement
- ❑ Liability generally limited to investment made
- ❑ Taxed at personal rates (as disregarded/pass through entity)
- ❑ Typically, easier to form/less formal
- ❑ Ability to select different entity form for tax purposes – *e.g.*, corporation/ S election
- ❑ Employment Taxes/Income Taxes



Other Business Forms

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- ❑ Limited Liability Partnership (LLP)
- ❑ Association
- ❑ Cooperative
- ❑ Non-stock corporation
- ❑ Statutory Close Corporation

State of Formation

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- Typically - State where operations mainly take place/corporate headquarters
- Delaware (tends to be a preferred state for formation)
- Registration in states where business operates (foreign corporation)
- Choice of law, jurisdiction, interpretation of agreements, etc.



Shareholder Considerations

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- Use of Agreements - Limitations v. Flexibility
- Often referred to as a Shareholder or Buy Sell Agreement – addresses details with multiple owners
- Ownership considerations, *e.g.*, 50/50 owners, spouses
- Life Situations (death, disability, divorce, marital property)
- Ownership requirements (certifications)
- Bring along; come along provisions
- Put and call provisions
- Typical structure – company first right, then owner rights, defined strategy to handle transfer of interests



Certification Considerations

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- Targeted Firms = MBE, DBE, VBE, SDVBE, WBE, etc.
- Targeted Firms – eligibility criteria
 - ▣ Ownership ($\geq 51\%$ owned by targeted owners)
 - ▣ Target Owner(s) operate and control business
- Ability to demonstrate ownership and control (form of business can impact information needed to demonstrate eligibility)
- Marital property considerations
- Document and Demonstrate



New Markets + New Products = Growth

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*“Joint Ventures and other collaborative business arrangements are revolutionizing how winning companies compete. **They permit companies to enter new markets and field new products that they otherwise couldn't do on their own. They are the quickest way to grow your company, particularly in times of change.**” [emphasis supplied]*

Curtis E. Sahakian

Seizing Market Opportunities

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- Strategic Alliances
- Joint Ventures – Formal/Informal
- Teaming Agreements
- Mentor – Protégé Arrangements
- Prime/Sub relationships

Each of these involves the formation of a relationship



Strategic Alliances

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NOT A LEGAL RELATIONSHIP **BUT** essentially an **UNDERSTANDING** between **TWO OR MORE PERSONS** whereby the **PARTIES AGREE TO ACT** in a certain way **TO ACHIEVE A COMMON GOAL.**

Persons may elect to document the strategic alliance. Often more of an “understanding” versus an agreement that the parties expect to enforce.



Joint Venture

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A LEGAL RELATIONSHIP . . . a contractual business arrangement between two or more persons usually to complete one or more specific projects.

- May involve a single project or a few projects but normally is NOT a long term relationship.
- May form a separate, distinct entity or may agree to collaborate more informally.

Teaming Agreement

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A LEGAL RELATIONSHIP . . . typically, where two or more persons agree to work together to compete for and perform a contract.

Federal Acquisition Regulation (FAR) FAR 9.601 defines contractor team arrangements as follows: “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 contract or acquisition program.”

Mentor-Protégé Arrangements

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- Typically provide opportunity for smaller, targeted firms to:
 - Work with “LARGE” businesses
 - Gain skills and build capacity
- Statutes/regulations provide when such arrangements may be used and benefits of such arrangements
- May establish M-P Arrangement and form a JV to pursue contract opportunities

Prime/Subcontractor Agreements

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- Essentially, an agreement to perform certain work in connection with a project
- Other arrangements may be documented using a subcontractor agreement (*e.g.*, teaming arrangements)
- Often used to gain experience with a prime contractor or subcontractor and/or access certain expertise in connection with a project

Opportunities

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- Federal – federal agencies have mentor-protégé programs.
- State and Local – may have incentives or programs to increase participation by underrepresented businesses.
- Private – most larger businesses (and many smaller businesses) have and/or participate in “supplier diversity” programs.

Entity Formation

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- What will each person do?
- Which arrangement makes sense?
- Conduct due diligence and consider how to mitigate risks.
- Consider regulations relating to affiliation, non-collusion, work performance requirements, etc.
- Don't put form over substance – why does the arrangement make sense?
- Pay attention to the details.



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