The Government Contractor Teaming Agreement Toolkit

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Introduction

A. Why a Teaming Agreement Toolkit?

Competition for federal programs, particularly large programs, often pits team versus team, not company versus company. The process of team formation, including conducting due diligence in selecting teammates and crafting the teaming agreement to memorialize the parties' intentions and guide the team, is fundamental to the success of the team arrangement, but often not well understood.

Team formation is too often approached in a reactive manner, undertaken during the heat of a competition without adequate attention to a decision with major competitive impacts and significant legal obligations. This is especially true when the process brings together – into a collaborative environment with a mutual goal – companies that are fierce competitors in other situations.

B. Toolkit Goal

Steptoe created this Teaming Agreement Toolkit to provide government contractors with an understanding of the team formation process, including the benefits and risks that can accompany the development and implementation of team arrangements.

To accomplish this goal, this Teaming Agreement Toolkit seeks to provide:

- Reasons why companies seek to form team arrangements with other companies;
- The Federal Acquisition Regulation (FAR) rules relating to team arrangements;
- Potential benefits and common risks found in the team formation process;
- Risk mitigation techniques and best practices to help make team formation an effective business builder and not a liability;
- Due diligence techniques and best practices to assist in evaluating a potential team member;
- Strategy points for negotiating and tailoring agreements; and

- Customer concerns about team arrangements, including anti-competitive issues.

C. The Role of Teaming Agreements

Government contractors may establish a team arrangement with another company as part of a contract win strategy. Such arrangements represent a common way to combine complementary capabilities and resources to compete effectively for contracts. In essence, a team arrangement moves a potential subcontractor's active involvement forward into the pursuit stage.

Several factors make the federal marketplace particularly appropriate for the formation of contractor team arrangements. In fact, for most contractors, team formation may be a strategic necessity. Government prime contracts may contain a broad scope of work that requires the research, development, production, integration, and implementation of a complex system. The scope and complexity may involve technology and expertise beyond the capabilities of any one company. Also, the requirements for presenting a bid or proposal may mandate the fulfillment of certain socio-economic goals, including the use of small and disadvantaged businesses to satisfy contract requirements. By using a team arrangement, the past performance and experience of the entire team, and not just of the prime contractor, can be highlighted in the proposal and evaluated by the Government customer.

Of course, companies will (and should) consider the benefit of "going it alone" and building in-house capabilities whenever the need for additional skills arises, instead of relying on other companies. But many factors help explain why collaboration through team arrangements has become common. As mentioned, the scope and complexity of contracts is a key factor. Other factors include rapid advancements in technology, perhaps a need to mitigate development or performance risk, customer bundling of diverse requirements, and intense competition requiring best in class performance for all aspects of the contract's scope of work. Contractors therefore recognize that team formation can be both a necessary and prudent strategy.

Although alliances are formed in all industries and even across industries, this Toolkit focuses on contractor team arrangements formed to address opportunities for Government contracts. Government contracting may be characterized as a monopsony, subject to customer regulation and oversight under the Federal Acquisition Regulation or "FAR." The FAR addresses contractor team arrangements and provides contractors with a regulatory regime that must be considered **and understood** when forming a team arrangement.

When forming teams, contractors must consider the Government customer's concerns about maintaining competition, particularly during times of industry consolidation, as well as concerns about ensuring best value in the selection of subcontractors for major subsystems and components. Other federal and state laws must also be considered, because the teaming agreement is, ultimately, an agreement between two commercial companies, governed by and enforceable under state law.

Teaming can also make good sense for companies that are not traditional Government contractors and want to enter the Government contracting market. This can make good sense. Despite the Government's efforts to attract commercial companies by employing more streamlined, commercial-like acquisition and business practices, wading into the Government marketplace, with its unique customs and rules, can be daunting for a commercial company. Entry into the Government marketplace as a member of a team that includes experienced Government contractors may ease the entry process. Commercial companies may want to use this Toolkit to learn about the teaming process to assist them in the pursuit of opportunities in the Government marketplace.

Whether a contractor is seeking an award as a prime contractor or is seeking a position on a team that could provide it a subcontract, the identification of a suitable teammate is important. The identification of a teammate should include a careful assessment of a potential teammate's past performance as well as a determination that the companies will be able to work together successfully. Prime contractors have learned that the combination of capabilities residing in separate companies must be managed effectively to perform and be successful. Since subcontractors lack privity of contract with the end Government customer, they must recognize the importance of adequate communication with the prime contractor to understand the end customer's needs and expectations.

D. Important Definitions

- **"Contractor Team Arrangement" or "Team Arrangement"**

For purposes of this Toolkit, "contractor team arrangement" or "team arrangement" refers to the definition found at FAR 9.6 – Contractor Team Arrangements:

> *"Contractor team arrangement," as used in this subpart, means an arrangement in which—*
>
> *(1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or*
>
> *(2) 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.*

- **"Teaming Agreement"**

For purposes of this Toolkit, "teaming agreement" refers to the written document that the teammates have executed to memorialize their team arrangement and its terms.

It should be noted that FAR 9.6 uses "contractor team arrangement" and *does not* define or even use the words "teaming agreement." Also, the FAR does not require a particular form of teaming agreement; in fact, it does not expressly mandate that the parties execute a written teaming agreement at all, and disputes have arisen over oral teaming agreements. A written agreement, however, allows the parties to clarify the purpose of their arrangement, state the obligations of the parties, and address the planned work allocation.

- **"Subcontract" and "Subcontractor"**

For purposes of this Toolkit, the terms "subcontract" and "subcontractor" are used in a broad sense consistent with the definitions at FAR 44.101:

> *"Subcontract" means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.*
>
> *"Subcontractor" means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.*

Steptoe hopes that this Teaming Agreement Toolkit will provide useful information for companies to use in their consideration and evaluation of team arrangements, and Steptoe can assist if questions or issues arise.

E. Scope of the Toolkit

This Toolkit discusses many of the key current and emerging requirements in a team arrangement and seeks to aid companies in understanding the importance of forming a team arrangement to compete in the Government marketplace as a small contractor or as an other than small contractor. It should be noted, however, that this Toolkit does not attempt to be all encompassing.

The Toolkit also includes a summary of some critical risk management issues observed by lawyers at Steptoe. It does not and cannot, however, address every risk issue, although it does seek to identify the basic standards for compliance. Likewise, it does not contain a comprehensive description of the "best practices" followed by experienced, highly responsible contractors, as those often exceed the minimum standards by a wide margin and will depend on various factors such as the nature of the contracts involved and the particular contractors' (and subcontractors') risk tolerance profiles.

For more information, Steptoe's team arrangements and teaming agreement points of contact for government contractors are Kendall Enyard, Paul Hurst, Tom Barletta, Peter Wellington, Ken Ewing, Mike Navarre, Fred Geldon, and Caitlin Conroy, or please visit Steptoe's Government Contracts Group website. We also extend our sincere gratitude to

Steptoe alumnus, Michael Mutek, who was a significant driver in preparing this Toolkit and a key contributor.

Forming Team Arrangements

A. Why Form a Team?

1. To Compete

A team arrangement may provide the combination of capabilities and resources needed to compete for the award of a contract that a single teammate could not perform on its own. Rather than reduce the number of competitors, the newly formed team may represent the creation of a new, credible competitor that can compete for the contract.

This potential competitive benefit of collaborative efforts between companies has been noted by the agencies charged with policing anti-competitive behaviors. As is discussed in the "Exclusivity" section of this Toolkit, the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) recognize that, in order to compete in today's marketplace, companies who are competitors in some areas may need to collaborate in others.

2. To Address Broad Work Scope Requirements

Some Government contract opportunities are very large. Systems contracts may involve extensive development followed by production. Complicated subsystems and components may need to be integrated. A team arrangement provides a way to select teammates that possess required capabilities and to engage them in the proposal preparation process, which may involve complex systems development considerations.

New opportunities may reflect a consolidation or "bundling" of work previously obtained through the award of several smaller contracts. The Government may realize certain benefits when it bundles requirements, such as lower administrative costs, economies of scale, reduced communication requirements, and the alignment of various systems and services. Teams may be necessary to perform a full, bundled contract. Teaming may also help contractors address the Government's supply chain requirements, including meeting small business and socio-economic goals.

3. To Address Necessary Qualifications

Competing effectively for an award of a large contract requires not only a broad set of skills and resources but also sufficient evidence of relevant past performance and experience. Past performance is a common source selection criterion. It may be necessary to reach out to other companies to show that the team possesses the relevant past performance, experience, and resources needed to submit a competitive proposal.

4. To Assist in Proposal Preparation

Forming a team arrangement during the early stages of pursuing a contract may facilitate the ability of the companies to work closely in developing and implementing pursuit strategies, as well as in preparing a competitive proposal. In fact, the availability of "preferred provider" teammates may be one of the first issues examined when a company is considering whether to bid an opportunity, which may come before the Request for Proposal ("RFP") is issued.

5. To Share Risk

Proposal efforts can be costly, requiring substantial expenditures of bid and proposal resources. Contractor performance may also involve cost risks, difficulties in finding employees with certain critical skills, or other issues. Teaming can spread these costs and risks among multiple companies.

B. What About Going it Alone?

Where an opportunity requires skills or technology not currently available in-house, a team arrangement may be an appropriate way to extend existing capabilities. That said, a company should also consider alternatives to teaming.

For example, a company may be able to develop needed capabilities in-house by training existing employees or hiring new employees with the requisite skills. This does not have to involve contingent hiring; in some cases the company can defer "purchasing" needed skills or services until after it wins the contract.

Developing in-house capabilities may also meet the company's long term strategic plans, making future teaming less necessary. This may be important if there are likely to be a number of anticipated opportunities in the area where the company currently lacks internal capabilities. Alternatively, a team arrangement may enable a contractor to avoid the time and expense of developing these capabilities internally.

The choice of teaming vs. in-house is called a "make-or-buy" decision. In fact, the Government has a strong interest in such decisions because make-or-buy decisions can be significant. For example, FAR 15.407-2 states:

> *When make-or-buy programs are required, the Government may reserve the right to review and agree on the contractor's make-or-buy program when necessary to ensure negotiation of reasonable contract prices, satisfactory performance, or implementation of socioeconomic policies.*

Collaboration may have drawbacks. For example, it can involve disclosure of proprietary information to competitors. Although non-disclosure agreements are commonly utilized when companies discuss a team arrangement, there may still be a concern that proprietary information could be used adversely or even to help create a future competitor.

Of course, the make-or-buy decision does not have to be all or none. A company may subcontract but limit the amount that it subcontracts. For example, a company can limit the team arrangement to only part of the required goods or services or to a certain time period.

Such restrictions, however, may affect the relationship between the companies, as well as any investment that will be provided by teammates. An offer of a larger opportunity is likely to translate to a greater willingness of a teammate to invest and to work for the award. Conversely, a subcontractor whose opportunity is limited may seek a more lucrative offer elsewhere.

C. Team Arrangements Are an Asset

One best practice is to consider a company's team arrangements to be an asset that may facilitate the company's ability to win work. The teaming relationships should be developed, maintained, protected, and appropriately used. Companies that possess the skills to form strong team arrangements and reach into the resources possessed by teammates may be more competitive. Government customers may consider the prime contractor's capability and past performance in forming, maintaining, and integrating teams of companies in making a source selection decision. In addition, achieving a favorable reputation as a prime contractor and a team leader will enhance the company's ability to get the best teammates and form the strongest team.

D. Risks

Notwithstanding the benefits, it would be a mistake to believe that forming a team arrangement with another company does not involve any risks. Team formation should not be approached in the same manner that a prime contractor approaches the issuance of a significant purchase order. A contractor team arrangement provides benefits, but it also raises risks. Companies must approach such arrangements, sometimes referred to as "marriages of convenience," with caution. Companies that enter into contractor team arrangements assume legal rights, obligations, and expectations that can give rise to disputes, claims, and legal actions. These are discussed in the following Sections.

Benefits of Teaming

A. What a Team Arrangement Can and Cannot Do

A team arrangement can:

- Leverage capabilities
- Reduce risk
- Facilitate market entry
- Resolve certain funding difficulties
- Respond to market threats
- Address experience or past performance requirements

However, a team arrangement is not a way to:

- Obtain another company's technology
- Avoid risk by transferring it to another company
- Enter into new markets without making an appropriate commitment – in other words, a team arrangement should not be used as a way to "test the waters"
- Eliminate all financial burdens
- Improperly reduce or eliminate competition
- Cover up past performance problems

A team arrangement may enable companies to merge their resources and expertise to compete more effectively. It can also mitigate development or financial risk by spreading those burdens among the team members. In addition, a team arrangement may provide important advantages or discriminators that will create a more competitive offering for the Government customer. For example, a company may possess, through its previous contracts, a strong reputation for successful performance with the awarding agency. By working together, this company may offer its teammate the ability to learn from an experienced company. This type of benefit is the basis for many successful mentor-protégé programs.

B. Legal Obligations

A team arrangement may also create potential risks that arise out of the discussion, negotiation, and execution of the necessary teaming agreements.

Most importantly, the provisions of the teaming agreement may limit future actions. For example, the agreement may preclude a later desire to perform the work in-house. In addition, teammates have explicit duties, and may also have implied duties to each other, including the duty of good faith and fair dealing.

Therefore, the teaming agreement should address several important aspects of the relationship, which are discussed in subsequent Sections. For example, the agreement should address termination of the arrangement and clearly provide the permissible bases for termination – which should NOT include a mere "change of heart." Care must be taken in entering into a team arrangement.

C. Benefits May Mirror Risks

There is a ying/yang aspect to teaming arrangements – their benefits often mirror their risks. For example:

- Sharing the risk of program performance or financial investment may be important, but it also means that the company is sharing the reward from the effort with its team member.
- Relying on another company to provide critical capabilities that the company does not possess can make economic sense, but it may mean that the company may not develop, or may delay, developing these critical capabilities in-house and may remain dependent upon other companies for them.
- Sharing proprietary information and "know how" may be a means to accomplish more together than could be done individually, but providing such information may raise the risk that critical information will be lost or a new competitor may be created.
- The commitment to subcontract to a teammate ensures that certain work will be performed, but this commitment can inhibit a later desire to change subcontractors or to "make" rather than "buy" that part or service.

A word on competitive information is in order. In order for a team to work together on a proposal for the team's benefit, the prime contractor must often share competitive information, including its business strategies. This may involve certain risks, since relationships can sour and events can occur – such as a merger or acquisition of a partner – that would impact the team arrangement. Achievement of a company's competitive strategy may require this tradeoff, however, in which the prime accepts a degree of risk associated with sharing proprietary and other sensitive information to maximize its chances of contract award. Careful teammate selection, including a reasonable due diligence process and attention to the relationship, can go a long way to mitigate potential risks. The key point is that successful teams must share trust. Without trust, a team arrangement may merely be a forced "marriage of convenience," governed by legal agreements and a "work to the rule" mentality.

Due Diligence

How does a company choose the best teammates? A company often has previous experience working with other companies that are teaming candidates. Through that process, it may be relatively easy to evaluate a potential candidate's capabilities from previous working relationships. Similarly, a teaming candidate might be identified through market research or publicity about their capabilities, projects or contracts.

Regardless of how the prospective teammate is identified, the company must obtain relevant information about a prospective teammate prior to team formation. Importantly, the time to examine a prospective teammate is before a team arrangement is formed, not afterwards.

A. What is "Due Diligence?"

Due diligence means conducting a prudent inquiry before entering into a relationship that carries legal liabilities. Another way to describe due diligence is that it is an appraisal of a potential business relationship to determine the benefits and risks.

The decision to explore the formation of a team is extremely important. Companies that understand the need for due diligence generally have a formal practice or policy that mandates due diligence as a prerequisite to the approval of the team arrangement.

As part of their due diligence efforts, companies should check the list of suspended and debarred companies. This check is necessary to assess and determine the responsibility of its prospective teammate. In addition, a company may pose questions to inquire into whether the potential teammate will invest in this program, and the expected division of the work.

B. What are the Goals for the Due Diligence Review?

The primary goals for the due diligence review are to:

- Evaluate the company as a potential teammate;
- Confirm information provided by the potential teammate;
- Inquire about and assess the technical and financial capabilities that the potential teammate will bring to the team;
- Examine possible liabilities and issues, such as negative past performance ratings, that may affect the assessment of the potential teammate;
- Determine what issues need to be addressed in the legal documents, including the teaming agreement that the parties plan to execute; and
- Determine the best allocation of work between the parties.

A due diligence inquiry can confirm the suitability of a teammate, or it may reveal red flags. It also can provide important information to corporate approval authorities and supporting functions involved in the team formation process, such as business development, supply chain management, contracts, and legal.

The due diligence inquiry should also provide important insight into any specific terms and conditions that the company may need to include in the legal documents to protect its interests. The final agreement will be stronger if it goes beyond standard boilerplate clauses and includes tailored provisions that result from the due diligence inquiry. Reliance on standard terms and conditions in the agreement is not a substitute for conducting due diligence.

C. How is Due Diligence Conducted?

A due diligence review gathers information on your potential partner. Where can you find this data?

- Databases exist that can aid in this due diligence inquiry. For example, a company can ensure that a potential teammate is not suspended or debarred by checking the Government's System for Award Management (located at www.sam.gov).
- Dunn and Bradstreet reports, analyst reports, annual reports as well as Security and Exchange Commission and other filings provide a wealth of information.
- The company's own website may reveal important qualifying (or disqualifying) information.
- Court records and newspaper and magazine articles can be accessed via commercial databases.
- There is great value in going to the facility of your potential partner and assuring yourself that everything "looks right."
- Talking to your potential partner and its customers will also be informative. This will provide important past performance information.

The overarching purpose of the due diligence inquiry is to determine whether the potential partner possesses complementary capabilities that are required to pursue an opportunity and whether the combination of the companies will be an effective means to leverage resources and win business without undue risk.

Depending on the specific due diligence review, a number of people may be involved in the due diligence inquiry. The members of the team may possess expertise in various areas, including contracts, business development, technology, finance, and law. These people could be company employees or, depending on the size and importance of the team arrangement, they could be outside experts engaged to provide this service, such as a law firm or an accounting firm. Due diligence can take anywhere from a few hours to several days.

A due diligence review for a team arrangement generally is informal – it is not usually conducted with the formality of the comprehensive due diligence review that would accompany a potential acquisition, for example. Teaming agreements do not, as a rule, include representations and warranties on the accuracy of information provided. That said, the use of such representations in teaming agreements has noticeably increased during the past few years.

D. Due Diligence Checklist

The specific areas of due diligence inquiry should be tailored to the transaction. Some companies use a due diligence form or template, which asks several pertinent questions about the potential team arrangement and teammate.

The following are examples of questions in a due diligence checklist:

- ✓ What is the reason for the selection of this potential teammate?
- ✓ Has financial information on the potential teammate been reviewed?
- ✓ Have we previously formed contractor team arrangements with this company?
- ✓ If there have been previous team arrangements with your company or others, were they successful?
- ✓ If not, describe the issues.
- ✓ Who are the other competitors/teams for this program?
- ✓ Can we perform the work in-house?
- ✓ If not, should we develop the capability to perform this work in-house?
- ✓ Why is a team arrangement proposed instead of a purchase order/subcontract?
- ✓ What is the customer's acquisition timetable?
- ✓ Do the parties understand and agree upon the intended division of labor (work scope)?
- ✓ Have anti-competitive issues been reviewed?
- ✓ Will the project require investment, and, if so, what will the teammate contribute?
- ✓ Identify the potential teammate's current and previous Government contracts and significant subcontracts; have there been significant past performance issues?
- ✓ If so, describe the issues, including the date and their resolution.

- ✓ Has there been any significant legal issues or proceedings involving the potential partner such as recent claims or disputes between the potential partner and its JV partners or subcontractors on other projects, or with its Government or commercial customers?
- ✓ Are there any ongoing audits, investigations or other proceedings that could have an impact on the pursuit of the U.S. Government contract, including a negative responsibility determination, or potentially result in debarment or suspension. (*See* FAR 52.203-5, 52.203-6 and 52.203-7.)
- ✓ Will the contractor team arrangement present OCI issues and, if so, can they be mitigated?
- ✓ Who will be the prime contractor?
- ✓ Whose standard teaming agreement will be used and are there issues with the terms?
- ✓ Will the contractor team arrangement seek to be exclusive (meaning that the teammates will not seek positions on other teams)?

Types of Teaming Arrangements

Teaming agreements can take several different forms. As noted above, a "contractor team arrangement" under the FAR 9.601 can involve either: "(1) Two or more companies form[ing] a partnership or joint venture to act as a potential prime contractor; or (2) A potential prime contractor agree[ing] with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program." Thus, a teaming agreement can be either horizontal or vertical in nature, as it can involve an agreement that a prime contractor will subcontract work to one or more companies to perform work as a prime contractor on a specific program (i.e., "vertical" agreement) or it could take the form of an agreement to form a joint venture between the companies (i.e., "horizontal" agreement).

A. Horizontal Teaming Arrangements

A horizontal teaming arrangement might take any of the following forms:

- Partnership
- Joint Venture (Populated)
- Joint Venture (Unpopulated)
- New Company (e.g., LLC)

The FAR does not provide a single definition of a "joint venture" applicable to all procurements. Indeed, FAR 4.102, which addresses the proper execution of a government contract, contemplates that "[a] contract with joint venturers may involve any combination of individuals, partnerships, or corporations."

Joint ventures can be partnerships or incorporated as separate legal entities. A joint venture agreement, whether formal or informal, must be in writing. The use of a joint venture that is incorporated as a separate legal entity can serve to protect the parent companies from liability. For example, the teammates may decide to form a corporation, which will be governed by state law. A primary benefit for incorporating is that the shareholders in a corporation gain the benefit of limited liability. Although there are several instances in which a court may "pierce the corporate" veil to put aside limited liability and hold a corporation's shareholders or directors personally liable for the corporation's action or debts, it is an unusual occurrence. Veil piercing is most common when the corporation has engaged in serious or egregious misconduct.

A limited liability company (LLC) can also be used in a team arrangement. An LLC is a hybrid organization that combines the attractive aspects of the partnership and corporation forms of business organization. An LLC is, as aptly-named, a limited liability organization which protects the members and owners from having personal liability. An

LLC also provides some of the same tax benefits and advantages as a partnership (*i.e.*, pass through taxation).

A joint venture does not need to be a separate corporation. For example, an unincorporated general partnership or limited partnership is a joint venture that does not have an independent legal existence apart from its partners. Joint ventures typically involve joint and several liability – each member can be liable for the obligations of the other(s). An unpopulated joint venture may have employees performing administrative work, but it does not use its own employees to perform a contract. An unpopulated joint venture relies on the joint venture's members to collectively serve as the prime contractor with each joint venture member performing work on the contract with its own employees. In contrast, a populated joint venture acts like an operating company with employees that it hires and compensates and uses to perform a contract.

To quality as a small business, however, the Small Business Administration (SBA) has narrowed its definition of "joint venture." As set forth below, it no longer permits most populated joint ventures that are separate legal entities to qualify as small.

> A joint venture . . . may be in the form of a formal or informal partnership or exist as a separate limited liability company or other separate legal entity; and, if it exists as a formal separate legal entity, may not be populated with individuals intended to perform contracts awarded to the joint venture (i.e., the joint venture may have its own separate employees to perform administrative functions, but may not have its own separate employees to perform contracts awarded to the joint venture).

See 13 C.F.R. § 121.103(h).

The SBA explained that the rule, which was implemented at the same time as the All Small Mentor-Protégé Rule, is intended to address concerns that "allowing populated joint ventures between a mentor and protégé would not ensure that the protégé firm and its employees benefit by developing new expertise, experience, and past performance." *See* 81 Fed. Reg. 48560 (July 25, 2016). The SBA was concerned that there was no guarantee that the individuals working for the populated joint venture would come to work for the protégé and therefore, a strong likelihood exists that the protégé would not receive any benefits from the arrangement. The SBA's proposed rule and commentary on the final rule discussed the change in the context of mentor-protégé joint ventures; however, the rule was implemented and promulgated as part of the SBA's size regulations. As a result, it appears that the rule applies to joint ventures that are part of the All Small Mentor Protégé Program and those outside of the program. Thus, the SBA's regulations restrict the use of populated joint ventures in mentor-protégé joint ventures and it restricts the use of populated joint ventures between two small businesses seeking to form a joint venture.

B. Vertical Teaming Arrangements

The most common type of team arrangement is the vertical prime-subcontractor relationship. This relationship can be advantageous for both parties.

Prime contractors face several issues related to the prime-subcontractor relationship. For example:

- The Government is in privity only with the prime contractor; therefore, the Government is concerned with the management of the team's subcontractors, which is the full responsibility of the prime contractor alone.

- The prime contractor also is solely responsible for successful contract performance.

- The Government also requires that certain provisions in the prime contract are included in any subcontract ("flow down provisions"). As a result, the prime contractor will flow down mandatory terms and conditions to comply with its obligations under the prime contract.

- The prime-subcontractor team arrangement cannot limit the Government's right to consent to the use of a particular subcontractor where applicable. FAR 9.604; 44.201-5.

In a vertical team arrangement, subcontractors also need to protect themselves from certain issues that may arise in the prime-subcontractor relationship. By way of illustration:

- Subcontractors want and need a firm commitment from the prime contractor because the subcontractor is foregoing other opportunities to join other teams for the same Government contract.

- Subcontractors also need the prime contractor's promise to use its best efforts to get the Government to consent to the use of the subcontractor.

- Subcontractors are working on the proposal effort. They may want the prime contractor to promise that, if it does not get this work, the prime contractor will retain the subcontractor for other work of equivalent value.

- Subcontractors may want the prime contractor to promise to reimburse all bid and proposal effort costs if the subcontractor is not assigned any work.

C. Conclusion

Regardless of the form of the team arrangement (vertical or horizontal), contractors should disclose the team arrangement to the Government, consistent with FAR 9.603. Usually this is done in the proposal because the prime contractor is seeking to use the intended subcontractor's past performance, experience, and capabilities as a discriminator.

Forming Joint Ventures with Small Businesses under the All Small Mentor-Protégé Program

The SBA's 2016 regulations that established mentor-protégé programs for all small businesses (the "All Small Mentor-Protégé Program") offer significant benefits to small businesses and the program may be the appropriate vehicle for large or small companies seeking to combine resources to compete for Government contracts. Prior to the implementation of the 2016 regulations, the mentor-protégé program had been limited to participants qualifying under the SBA's 8(a) program (for small businesses owned or controlled by socially and economically disadvantaged individuals). Under the 2016 regulations, the SBA created a mentor-protégé program for all small businesses, which is modeled on the 8(a) program and available to women-owned small business (WOSB), service-disabled, veteran-owned small business (SDVOSB), HUBZone concerns, and small businesses that are not part of a designated SBA program.

A. Benefits of the All Small Mentor-Protégé Program

The program encourages approved mentor firms (typically those that are "other than small" businesses) to provide business development assistance to protégé firms and to help protégé firms successfully compete for Government contracts. 13 C.F.R. § 125.9(a). The regulation permits the mentor to provide a broad range of assistance to the protégé, including technical and/or management assistance, financial assistance (equity investments and/or loans), subcontracting (either with the mentor as the prime contractor or subcontractor), trade education, or performing federal contracts as the prime contractor through joint venture arrangements. In addition, the rules encourage mentors to provide assistance relating to the performance of contracts set aside or reserved for small business so that the protégé may fully develop its capabilities. The rule also allows mentors to own up to 40% of the small business protégés. 13 C.F.R. § 125.9(d)(iii)(B)(2).

B. Formation of a Joint Venture Based on a Mentor-Protégé Relationship

Under this program, "other than small" contractors and small business contractors apply to enter into an agreement to form a mentor-protégé relationship in accordance with SBA regulations (discussed further below). If the SBA approves the mentor-protégé relationship, the mentor and protégé may enter into a second agreement to form and to create a joint venture that would be treated as a small business for any type of prime contract or subcontract for which the protégé qualifies as small. 13 C.F.R. § 125.9(d)(1). The second agreement forming the mentor-protégé joint venture must be in writing and also approved by the SBA before the joint venture submits an offer on a prime contract or subcontract, in order to receive an exclusion from the SBA's affiliation rules. 13 C.F.R. §§ 125.9(d)(1)(i), (ii).

Although the affiliation rules would not apply based solely on the mentor-protégé relationship, the joint venture agreement must still comply with 13 C.F.R. §§ 125.8(b)(2), (c), (d). Among other things, those rules require the joint venture agreement to identify the specific tasks assigned to each member of the joint venture (including major equipment, labor, and other resources). *See* 13 C.F.R. § 125.8(b)(2). The joint venture also must satisfy the applicable percentage of work requirement set forth in 13 C.F.R. § 125.6 for the type of work being performed by the joint venture combined and the protégé of the joint venture must perform at least 40% of the substantive work performed by the joint venture. 13 C.F.R. § 125.8(c). Finally, the joint venture must submit written certification to the contracting officer and the SBA stating that the parties have entered into a joint venture that complies with Sections 125.8(b)(2) and 125.8(c) before performing the contract. 13 C.F.R. § 125.8(d).

C. Qualifying for the All Small Mentor-Protégé Program

To qualify as a mentor, the contractor must demonstrate a commitment and ability to assist small businesses, possess good character, and cannot be a debarred or suspended contractor. 13 C.F.R. § 125.9(b). The SBA will evaluate the prospective mentor's financial capability, including consideration of tax returns, audited financial statements, and SEC filings. 13 C.F.R. § 125.9(b)(2). After the contractor is approved as a mentor, it must annually certify that it continues to possess good character and favorable financial capabilities. 13 C.F.R. § 125.9(b)(3). With the SBA's authorization, a mentor may have more than one protégé, but no mentor will be permitted to have more than three protégés at one time (inclusive of protégés under the all-small program and the existing 8(a) program). 13 C.F.R. § 125.9(b)(4).

To qualify as a protégé, the concern must "qualify as small for the size standard corresponding to its primary NAICS code or identify that it is seeking business development assistance with respect to a secondary NAICS code and qualify as small for the size standard corresponding to that NAICS code." 13 C.F.R. § 125.9(c)(1). If the prospective protégé is not small in its primary NAICS code and it seeks to qualify as small under a secondary NAICS code, it must demonstrate how the mentor-protégé relationship is a logical business progression that would further develop the firm's capabilities. 13 C.F.R. § 125.9(c)(1)(ii). The SBA will not approve a mentor-protégé relationship for a secondary NAICS code in which the firm has no prior experience. *Id.* With the SBA's approval, a protégé may have more than one mentor, but it may not have more than two concurrent mentors.

All mentor-protégé relationships must be formalized in a written agreement that identifies the protégé's needs and provides a detailed description of the mentor's commitment to meet those needs for at least one year. 13 C.F.R. § 125.9(e). Agreements are limited to an initial term of three years, but the SBA will authorize and extend an additional three year term provided that the protégé has received and will continue to receive the agreed-upon business development assistance. The SBA must review and approve the written agreement before it takes effect and the SBA must approve all changes to the written agreement. 13 C.F.R. § 125.9(e)(6). The SBA's control and affiliation rules will not automatically apply based solely on an approved mentor-protégé agreement, but compliance with the affiliation rules, as set forth in 13 C.F.R. § 103, is still generally required. 13 C.F.R. § 125.9(d)(4).

The All Small Mentor-Protégé Program also requires the protégé to provide an annual report to the SBA and provide a narrative that describes the success achieved in meeting the protégé's developmental needs. 13 C.F.R. § 125.9(g). After the relationship has concluded, the protégé must submit a final report to the SBA that addresses whether the relationship was beneficial. 13 C.F.R. § 125.9(i). The mentor is likewise required to submit similar reports. *Id*.

D. Risks Related to the All Small Mentor-Protégé Relationship

Many of the same compliance-related risks apply to both the mentor and protégé seeking to take advantage of this expanded program. If the SBA determines that the mentor failed to provide the protégé with the assistance that it committed to provide under the agreement and the mentor fails to provide an adequate explanation for the failure, the SBA may terminate the agreement. Among other remedies, the SBA may declare the mentor ineligible to act as a mentor for a period of two years, recommend that the procuring agency issue a stop work order on all federal contracts that the mentor and protégé are performing as a small business, and refer the mentor for potential suspension and debarment. 13 C.F.R. § 125.9(h). The SBA also will evaluate compliance based on any mentor-protégé joint ventures that fail to comply with 13 C.F.R. §§ 125.8(b)(2), (c), (d), (g) and will consider the same types of remedies listed above; in certain circumstances, the SBA also could evaluate potential remedies under available fraud statutes, such as the civil False Claims Act.

In fact, there are some cases where the protégé was the whistleblower reporting alleged violations of the False Claims Act. For example, according to a Justice Department press release, Saiz Construction and its owner initiated a False Claims Act lawsuit against its mentor under the Act's whistleblower provision, which permits private parties to file suit on behalf of the Government. The protégé alleged that its mentor prepared bids for 8(a) contracts under an invalid mentor-protégé joint venture and that the mentor's "employees served as project managers, submitted invoices and performed payroll and other accounting functions." The protégé also alleged that the mentor had "concealed" its extensive involvement by misrepresenting to the Government that its employees were employees of the protégé. Those allegations suggest that, at some point, the protégé had knowledge of, or even a role in, the alleged fraud. Regardless, the mentor ultimately settled the lawsuit with the Government for slightly less than $1 million, a portion of which was paid to the owner of the protégé firm.

Parties also could face criminal exposure arising from falsely misrepresenting the size status of a mentor-protégé joint venture. For example, another Justice Department press release from April 2017 reported that the Government had charged owners of construction and telecommunications companies for fraudulently obtaining more than $11 million in federal contracts set aside for service-disabled veteran-owned businesses. The indictment alleged that the owners had engaged in a conspiracy to defraud the Government by forming a joint venture and falsely claiming that it qualified as a service-disabled veteran-owned small business based on the role of one of the JV members. Contrary to this representation, the Government alleged that the owners had entered into a "secret side agreement" where the large company would control "the day-to-day management, daily operation and long-term decision making of JV" in exchange for a majority of the revenues.

Cases like these demonstrate the importance of conducting due diligence of potential joint venture partners, including finding teaming partners that have a shared commitment to business integrity and compliance.

Subcontracting Teaming Arrangements: Other Considerations

Teaming partners can form a vertical team arrangement to pursue unrestricted or full or partially set-aside contracts. For an unrestricted contract, it is common for the "other than small" business contractor to act as the prime contractor with the Government customer. For a full or partially set-aside contract, the small business contractor would act as the prime contractor with the Government customer and the "other than small business" contractor would be the subcontractor. Regardless of the structure of the subcontracting team arrangements, teaming partners should consider other requirements under the FAR and SBA regulations related to subcontracting before entering into a teaming agreement.

A. Limitations on Subcontracting Under Small Business Set-Asides

Because many federal procurements are set aside exclusively or partially for contract award to a small business (or provide price preferences to certain small businesses), large companies may consider pursuing subcontracting opportunities with small business prime contractors to obtain a portion of those federal dollars. Although there is no prohibition against a large business serving as a subcontractor on such contracts, there are restrictions on the role of the large business in both the contract and the affairs of the small business. These restrictions should be considered to preserve the small business prime contractor's eligibility for a set-aside award as well as its small business status.

The SBA's "Limitations on Subcontracting" regulations, for full or partial set aside contracts with a value greater than the simplified acquisition threshold (currently $150,000), limit the subcontracting amount that a large business performs under the contract to a percentage of the award amount received by the small business prime contractor. *See* 13 C.F.R. § 125.6(a), (f). For example, the limitation or cap on subcontracting for contracts for both services and supplies is set at 50% of the award amount received by the small business prime contractor. *See* 13 C.F.R. § 125.6(a)(1)-(2). The limitation or cap for general construction subcontractors is 85% of the award amount (75% if the contract is for "special trade" subcontractors). *See* 13 C.F.R. § 125.6(a)(3)-(4). A different set of rules applies to contracts for both services and supplies (i.e., "mixed contracts"). *See* 13 C.F.R. § 125.6(b). The SBA adopted these regulations to implement legislation that had changed the method of calculating the work to be performed by the small business prime contract, changing the methodology from a cost-based assessment of the subcontracted work to a revenue, or "amount received," assessment, as outlined above. The FAR council, however, has not yet modified the FAR's Limitation on Subcontracting clause to reflect this change. As a result, for the time being, contractors are subject to seemingly conflicting rules, as FAR 52.219-14 provides that the small business must perform at least a certain percentage of the ***cost*** of the contract. *See* FAR 52.219-14(c).

Unrelated to the SBA's rules, some fixed-price construction contracts may include the FAR's "Performance of Work" clause (FAR 52.236-1), which requires the prime contractor to perform "with its own organization" a certain percentage of the total amount of work to be performed under the contract, which will be identified on a contract-by-contract basis by the agency. This clause, however, should not be used in procurements set aside for small businesses. *See* FAR 36.501(b).

Compliance with the applicable limitations on subcontracting, however, does not inoculate the small business from potential scrutiny under the SBA's rules on affiliation. In assessing a firm's size under the SBA's size standards, the SBA considers the size of any firms "affiliated" with the firm claiming "small business" status. In general, the SBA's regulations provide that two businesses are affiliates of each other when one controls or has the power to control the other, or a third party controls or has the power to control both. 13 C.F.R. § 121.103(a). In assessing affiliation, those rules identify a number of factors that could be implicated even by arms-length subcontracting relationships, such as contractual relationships, identity of business or economic interests, or economic dependency through contractual or other relationships. 13 C.F.R. § 121.103(a),(f).

For example, SBA regulations have adopted a presumption of affiliation based on a fixed percentage of economic dependence of one firm on another. 13 C.F.R. § 121.103(f)(2). Specifically, the SBA will find a presumption of affiliation if a firm derives 70% or more of its revenue from another firm. The presumption of affiliation is rebuttable and economic dependence is measured over a three year period.

The SBA also applies an "ostensible subcontractor" rule, providing for a potential finding of affiliation where a subcontractor performs "primary and vital" requirements of a prime set-aside contract or where the small prime contractor is "unusually reliant" on a large subcontractor. 13 C.F.R. § 121.103(h)(4). If the SBA determines that two entities are affiliated under these rules, then the SBA considers the size of both entities for purposes of its size determination. In other words, a finding of affiliation with a large business means that the small business is not considered small.

Although not every non-compliance with limitations on subcontracting or finding of affiliation would warrant enforcement activity by the Government, there could be severe consequences for failing to comply with these provisions, especially if the non-compliance is perceived as an effort by the large business to improperly benefit from programs designed to support small businesses. Those consequences could range from the termination of the contract, the pursuit of civil or criminal remedies including penalties and fines under the Small Business Act, the False Claims Act, and Program Fraud Civil Remedies Act, or the suspension or debarment from government contracting. Congress, for example, amended the Small Business Act to provide that "[w]hoever violates" one of the enumerated limitations on subcontracting would be subject to the penalties of $500,000 or the amount spent on large subcontractors in excess of the limitations, whichever is greater, in addition to other remedies, such as suspension or debarment. 15 U.S.C § 645(d) & (g); 13 C.F.R. § 125.6(h). Similarly, in an effort to overcome certain obstacles faced by the Government in proving actual damages caused by the successful performance of a contract awarded to a firm misrepresenting its size status, Congress has attempted to implement a presumption of loss to the Government equal to the total amount the Government expended on the contract. 15 U.S.C. § 632(w); 13 C.F.R. § 121.108(a).

Small and large contractors should be cognizant of the applicable regulations and contract terms limiting the role of large businesses in the performance of small business set-aside contracts and consider taking steps to ensure that the prime-subcontractor relationship is documented and could withstand scrutiny. For example, a small business seeking to subcontract with a large business should monitor and audit its own size eligibility before representing itself as eligible. Both contractors also could consider documenting (i) how the relationship meets the precise calculation identified in the Limitation on Subcontracting clause (and any other "performance of work" requirements applicable to the small business prime contractor) and (ii) how the relationship is consistent with the SBA's affiliation rules.

B. Limitations on Pass-Through Charges

Congressional concern with excessive pass-through charges – the layering of costs through tiers of subcontractors that arose in conjunction with FEMA contracting post-Katrina resulted in legislation that required DoD to "prescribe regulations to ensure pass-through charges are not excessive." Pursuant to Section 866 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, the FAR was amended to disallow excessive pass-through charges by contractors (or lower-tier subcontractors) that did not add value to the subcontracted work. The FAR implemented the mandate through the solicitation provision at FAR 52.215-22 and the contract clause at FAR 52.215-23.

These FAR provisions define excessive pass-through charges as follows:

> Excessive pass-through charge, with respect to a contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the government by the contractor or subcontractor that is for indirect costs or profit/fee on work performed by a subcontractor (other than charges for the costs of managing subcontracts and any applicable indirect costs and associated profit/fee based on such costs).

If a contractor plans to subcontract over 70 percent of the total cost of work to be performed under its contract, the contractor is required to describe the added value that it will provide to the work to be performed by its subcontractors. Also, if during performance the contractor learns that will be subcontracting out more than 70 percent of the work, it must report that development and provide an explanation of the added value it will provide.

Guidance issued by the Defense Contract Audit Agency (AGM 11-PSP-003) instructs auditors to classify a proposal as inadequate if the added value explanation is lacking. Also note that contracting officers will not necessarily come back to you and ask for a more detailed description if the auditor states the proposal is inadequate and/or the contracting officer believes the initial description is lacking.

This rule should be considered during the formation of team arrangements in order to avoid an issue with the allowability of indirect costs or profit/fee.

C. Small Business Subcontracting Plans

Large business prime contractors are required to implement subcontracting plans to identify “maximum practicable subcontracting opportunities for small business concerns” in the performance of federal contracts. 13 C.F.R. § 125.3; FAR Subpart 19.7. In an unrestricted procurement, FAR 52.219-9 requires large business prime contractors to prepare and comply with subcontracting plans for federal contracts or subcontracts for goods and services exceeding $700,000 (or $1,500,000 for construction contracts).

Subcontracting plans set forth a commitment by the large business identifying its goals for contracting with small businesses (to provide “maximum practicable opportunities”), including goals by each socioeconomic category, such as those owned or controlled by veterans, service disabled veterans, women, or socially and economically disadvantaged individuals, and its plan for meeting those goals. Large contractors are generally held accountable to achieve, or make good faith efforts to achieve, the written goals established in their subcontracting plans.

Small business subcontracting plans are not required where (1) the prime contractor is a small business or small disadvantaged business; (2) the contract is a personal services contract; or (3) the contract will be performed entirely outside of the United States. There is also an exception for contracts including FAR 52.212-5 (contracts for commercial items). FAR 52.219-9(d)(9) further provides for the prime contractor to flow down the requirement for a small business subcontracting plan to “all subcontractors (except small business concerns) that receive subcontracts” in excess of the dollar thresholds above where there is “further subcontracting possibilities.”

There are three types of subcontracting plans: (1) commercial plans; (2) individual plans; and (3) master plans. *See* FAR 19.701, 19.704. Commercial subcontracting plans are company-wide plans that contain goals based on the contractor’s planned subcontracting for ***all*** of its business (Government and commercial). FAR 19.704(d). Commercial plans are preferred for contractors that furnish commercial products or services to the Government and to commercial customers and are negotiated and submitted annually based on the company’s fiscal year.

An individual subcontracting plan applies to a specific contract and covers the entire contract period, including option periods. The goals for individual plans are based on the contractor’s planned subcontracting in support of the specific contract, stated in terms of separate dollar and percentage goals. Individual plans must be negotiated and approved by the contracting officer prior to award.

Master subcontracting plans contain all of the required elements of an individual plan, except goals. FAR 19.704(b). Master plans are then supplemented by individual contract goals when contracts are awarded. Master plans are in effect for three years; however, master plans will apply to a contract for the life of the contract when the master plan is incorporated into an individual plan.

Each subcontracting plan should contain the required elements set forth in FAR 19.704(a). The SBA regulations also require prime contractors to provide prior written notice to a subcontractor that it intends to identify the small business by name as a potential subcontractor in a proposal, offer, bid or subcontracting plan in connection with a federal contract. 13 C.F.R. § 125.3(c)(8).

To determine compliance with their small business subcontracting plans, prime contractors are required to submit "timely and accurate" subcontracting reports (semi-annually for DoD and NASA) that set forth their status, achievements, and compliance with the plan's goals. 13 C.F.R. § 125.3(c)(vi); *see also* FAR 52.219-9. In making these statements about compliance and subcontracting with small businesses, the FAR provides that "[a] contractor acting in good faith may rely on the written representation of its subcontractor regarding the subcontractor's status as a small business" and its socioeconomic status. FAR 19.703(b). The SBA regulations require the contracting agency to collect, report, and review data on the extent to which the large contractor complies in good faith with the goals and objectives of its subcontracting plan. 13 C.F.R. § 125.3(f)(8). The regulations also impose reporting requirements for anyone who believes that a prime contractor or subcontractor has engaged in fraudulent activity or bad faith behavior related to its subcontracting plan. 13 C.F.R. § 125.3(c)(9).

The SBA regulations similarly provide that "[a] prime contractor acting in good faith should not be held liable for misrepresentations made by its subcontractors regarding the subcontractors' size." 13 C.F.R. § 121.108(d). This regulation further states that "[r]elevant factors to consider" in evaluating the prime contractor's good faith "may include the firm's internal management procedures governing size representation or certification, the clarity or ambiguity of the representation or certification requirement, and the efforts made to correct an incorrect or invalid representation or certification in a timely manner." *Id*. These provisions are repeated for various socioeconomic small business categories at 13 C.F.R. §§ 121.411(h), 124.521(d), 124.1015(d), 125.29(d), 126.900(d), and 127.700(d).

These SBA regulations suggest that, prior to seeking credit for subcontracting with a small business, a prime contractor should consider taking steps to document its "good faith." Depending on the particular facts and type of procurement, such steps could include maintaining written representations received from small businesses, checking those representations against data available in federal contracting databases, such as the System for Award Management (a step that a contractor must take for a subcontractor representing itself as a HUBZone small business under FAR 19.703(d)(1)), and asking vendors to update representations on an annual basis or due to a change in status. Contractors are not generally held liable for missing a goal, as long as they have made a good faith effort to reach that target and have followed their subcontracting plans in doing so. In evaluating whether a prime contractor made a good faith effort to comply with its small business subcontracting plan, contracting officers may consider, among other factors, supporting documentation showing that (1) the contractor performed the actions identified in the SBA's regulations for maximizing small business subcontracting opportunities, such as market research about available small businesses or soliciting offers from small businesses early in the procurement process; or (2) despite a contractor's failure "to achieve its goal in one socioeconomic category, it over-achieved its goal by an equal or greater amount in one or more of the other categories." 13 C.F.R. § 125.3(d)(3). Contractors also are subject to an on-site "compliance review" by the SBA, as a supplement to the contracting agency's review, to determine the "contractor's achievements in meeting the goals and other elements in its subcontracting plan for both open contracts and contracts completed during the previous twelve months." 13 C.F.R. § 125.3(f)(1).

If the prime contractor did not meet all of the small business subcontracting goals in its plan by contract completion, it will need to submit to the contracting officer a written explanation as to why it did not meet the plan's goals for the agency to evaluate whether the prime contractor acted in good faith in implementing its plan. 13 C.F.R. § 125.3(c)(6).

A contractor's failure to make a good faith effort to implement its plan can constitute a material breach of contract and lead to a termination for default. The contractor also is subject to the potential assessment of liquidated damages as provided under 13 C.F.R. § 125.3(f)(5)(i) and the procedures at FAR 19.705-7 and FAR 52.219-16. Those liquidated damages could equal to the actual dollar amount by which the contractor failed to achieve its subcontracting goals.

Regardless of the contractor's good faith efforts, the ramifications of a contractor's failure to meet its subcontracting plan goals can extend into the future. The SBA regulations expressly state that a finding that a contractor failed to provide a written corrective action plan or failed to make a good faith effort to comply with the subcontractor plan will constitute a material breach of the contract and the failure will be considered in the past performance evaluation of the contractor. 13 C.F.R. § 125.3(f)(5)(ii). This change is consistent with case law that has found that agencies are authorized to include an evaluation factor in a solicitation assessing the offeror's proposed approach to small business subcontracting, the extent to which it has met its small business subcontracting goals on previous covered contracts, and the extent to which it timely paid its small business subcontractors under covered contracts. 13 C.F.R. § 125.3(g). *See also Graybar*, B-410886, Mar. 4, 2015, 2015 CPD ¶ 102 (denying protest challenging exclusion from competitive range based on deficiencies under the past performance factor where offeror failed to include "the required information regarding socioeconomic subcontracting goals and actual performance in meeting its subcontracting plan goals"). As a result, to avoid missed goals and receiving unfavorable evaluations in future procurements, contractors should consider steps to increase the likelihood of success in implementing its plan. These could include (1) appropriately defining the pool of dollars capable of being subcontracted to small businesses; (2) negotiating reasonable and realistic subcontracting goals based on the nature of the work; and (3) identifying in the plan discrete, objective steps for measuring good faith efforts for meeting the plan.

Team arrangements may not be formed for impermissible purposes, such as the elimination of competition. For example, while the FAR provides that the Government generally *will* recognize the integrity and validity of a teaming agreement and *will not* normally require or encourage the dissolution of a teaming agreement, it also makes clear that a teaming agreement cannot violate antitrust statutes. *See* FAR 9.604. Antitrust and competition laws also apply whenever potential competitors seek to collaborate, and team arrangements are not exempted from these requirements. Parties should therefore consider whether a particular team arrangement may be construed to be anti-competitive before implementing the arrangement or consummating a related agreement.

As a result, since team formation requires compliance with applicable laws, part of the due diligence process should be a review by legal counsel of the potential anti-competitive aspects of the team arrangement. The benefits to the Government customer that result from cooperation should be clear and expressly stated in any written agreement that is prepared between the companies. Benefits can include advancement of technology, efficiencies that reduce costs, complementary capabilities that are required to satisfy the customer's requirements, or a need for production capability that requires collaboration. Cooperation can enhance competition where the individual parties could not have bid alone because of a lack of financial or technological capability.

A. Applicable Statutes

Although a thorough examination of the antitrust laws is beyond the purpose of this Toolkit and companies should seek legal advice to address this area, a very brief summary of the major federal antitrust laws that may impact contractor team arrangements in the United States follows.

The Sherman Act (15 U.S.C. § 1 *et seq*. (2000)) is the most important of the Federal antitrust laws that must be considered ("Section One"). It prohibits a company from entering into contracts, combinations and conspiracies that restrain trade, imposing both civil and—for the most egregious violations—criminal consequences for both companies and individuals involved. There are two main sections to the Sherman Act. The Courts have interpreted Section One of the Act to prohibit any formal or informal agreement that unreasonably reduces competition. Agreements and other combinations that merely aim to raise prices or reduce output without any countervailing benefits for customers or the economy are *per se* illegal. Examples include price fixing, bid rigging, and customer allocation agreements between direct competitors.

Agreements and other combinations that might plausibly improve competition can also be illegal if, on balance, the harms outweigh the benefits under the particular circumstances of the agreement, to the markets, the companies, or the customers involved. Examples of these latter kinds of combinations include exclusive dealing, tying the sale of a product or service to the purchase of another, refusing to deal with a competitor or customer, overly restrictive licensing covenants, certain patent pools, and joint R&D, production or marketing activities. To assess the overall balance of benefits and harms, these kinds of combinations are analyzed under the "Rule of Reason" in a flexible but searching inquiry into all aspects of the specific combination or agreement and their impacts on affected markets, customers, and competitors. It is the *per se* rule of Section One that has been applied to alleged bid rigging in Government procurement, whereas the more detailed Rule of Reason applies to team arrangements that offer plausible benefits.

Section Two of the Sherman Act tends to be less important for team arrangements but can come into play in certain circumstances. This Section prohibits unilateral conduct (i.e., without agreement) that creates or maintains a monopoly, or attempts to do so, by using strong market power to exclude other competitors. The Section also prohibits conspiracies to achieve these results. Examples of potential violations include buying upstart competitors, refusing to license or sell critical inputs to competitors, pressuring customers not to buy from competitors. Team arrangements can run afoul of Section Two either as alleged conspiracies to monopolize or if one of the parties with a strong market position (e.g., market shares above 60%) unilaterally uses the team arrangement to sideline a plausible competing bidder.

Next to the Sherman Act, the other major federal antitrust statute is Section Seven of the Clayton Act (5 U.S.C. § 18 (2000)). This law prohibits mergers and acquisitions of stock or assets, including intellectual property rights, if the result threatens to substantially lessen competition or to create a monopoly. Related to this statute is the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (5 U.S.C. § 18a), which requires parties to mergers, acquisitions, and new joint ventures above certain threshold values to notify federal antitrust authorities and wait a specified period of time to permit review and possible attempts to block the deal before its consummation. Team arrangements can trigger the Clayton and Hart-Scott-Rodino Acts if they will cause stock or assets to change hands or if new joint venture entities will be created. Federal authorities assess the legality of such combinations pursuant to a careful economic analysis of their overall effects on relevant markets and often intercede when fewer than two or three companies will remain competitors in any significant market segment or when major customers, such as DoD in defense procurement markets, complain.

The federal antitrust laws are enforced by both the U.S. Department of Justice's Antitrust Division ("DOJ") and the Federal Trade Commission ("FTC"). They may also be enforced by private parties and by State Attorneys General, who may seek trebled civil damages, attorneys' fees and costs, and injunctive relief. Injunctive remedies requested by Government agencies or private parties can include orders to change business practices or to block or restructure acquisitions or mergers. In addition, the Federal Trade Commission Act (15 U.S.C. § 45 (2000)) empowers the FTC to challenge conduct not technically in violation of the Sherman or Clayton Acts as unfair methods of competition, and it may initiate any enforcement either in federal district court or in its own administrative court. This law enables the Federal Trade Commission to challenge alliances that it believes would violate either the Sherman or Clayton Acts. As a practical matter, DOJ has taken the lead on most cases involving defense procurement, but the FTC can take the lead when team arrangements affect mixed civilian and DoD markets.

Congress has passed several other statutes to clarify or create limitations and exceptions to general antitrust law in certain limited circumstances. For example, the National Cooperative Research and Production Act of 1993 or "NCRPA" (15 U.S.C. § 4301 (2000)) can occasionally be relevant to teaming agreements. The NCRPA and a predecessor statute sought to encourage research and development joint ventures by requiring the application of the "rule of reason" when evaluating joint ventures engaged in basic research and related production and limiting to actual (single) damages any recovery for harms caused to third parties, so long as certain disclosures are made to the Government before starting the joint venture. Similarly, the Webb-Pomerene Act (15 U.S.C. §§ 61-66 (2000)) and Title III of the Export Trading Company Act of 1982 (15 U.S.C. §§ 4011-4021 (2000)) confer partial immunity or limited damages for antitrust harms caused in the U.S. by activities aimed at exports, again so long as the activities are pre-notified to certain Government agencies. There are no similar exceptions or limitations for activities relating to imports of goods or services to the United States. Indeed, U.S. antitrust laws apply fully to conduct outside the United States if that conduct affects sales in or into the United States.

B. Application to Teaming Arrangements

It is not surprising that the Government has an interest in the contractor teams formed to pursue major defense programs. For example, DoD became concerned with impact of exclusive team arrangements during a period of consolidation of the defense industry in the 1990s and issued a policy in 1999 that mandated heightened scrutiny of teaming arrangements and joint ventures in order to ensure the maintenance of adequate competition.

That policy noted that although the Government's preference is to allow private companies to form teams and subcontracts without Government involvement, there are circumstances that require intervention in order to assure adequate competition. A revision to the DFARS was also proposed to add exclusive teaming arrangements to the list of practices that may be evidence of a violation of the antitrust laws; however, the rule was withdrawn as a result of numerous comments which, among other things, noted that team arrangements can be pro-competitive and that a prohibition against exclusivity in teaming may inhibit the creation of pro-competitive teams. Despite the withdrawal of the DFARS rules, certain agencies do impose a restriction on exclusive team arrangements and any such restriction should be noted.

As noted above, the FAR recognizes that team arrangements can yield valuable benefits to the Government by assembling complementary capabilities and spreading technological and financial risk, but also expressly states that nothing in the FAR authorizes team arrangements in violation of the antitrust statutes. It also makes clear that its allowance of teaming agreements does not limit the Government's rights to require consent to subcontract, pursue competitive subcontracting policies such as component breakout, or hold the prime contractor fully responsible for contract performance, regardless of any team agreement. *See* FAR 9.604.

Finally, the FTC and the DOJ have issued Antitrust Guidelines for Collaborations Among Competitors to explain how they apply antitrust laws to collaborations in any industry, including the defense industry. These Guidelines acknowledge the importance of collaboration in the modern economy, noting in the preamble:

> In order to compete in modern markets, competitors sometimes need to collaborate. Competitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs.[1]

The Guidelines point out that collaboration with such goals often enhances competition and improves economic efficiency by combining different capabilities or resources. However, collaborations that merely raise prices or limit output without plausible hope for pro-competitive benefits, such as price fixing, bid rigging or customer allocation, are *per se* illegal. Other collaborative efforts that do aim for plausible pro-competitive benefits are examined under a rule of reason, which is a searching and flexible inquiry to assess the net impact of all aspects of the specific collaboration on affected customers, competitors, and markets.

[1] Fed. Trade Comm'n & U.S. Dept. of Justice, *ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS* (2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

Exclusivity

Contractors frequently will seek exclusivity in their teaming agreements. Each wants the other team member to be committed to the relationship, and neither wants to worry about the other competing with other companies for the same or similar program or project. Effective teaming requires a foundation of trust. Exclusivity may encourage the greatest cooperation between the parties to achieve the goals of the teaming agreement – in fact, a lack of exclusivity can undermine those goals. Exclusivity clauses can also enhance the enforceability of teaming agreements, because exclusivity may provide legal consideration and demonstrate the parties' intent to be bound by the agreement. At the same time, a company may wish to provide a standard product or service to multiple prime contractors.

When companies collaborate as a team and prepare a proposal in response to an RFP, they typically share proprietary information, including team strategies. An arrangement that is not exclusive tends to inhibit the free flow of information. When a teaming partner plays on multiple teams, it must generally erect firewalls, isolate proposal writers, and exclude certain team members from certain strategy sessions. These alternatives are burdensome at best, and may not be feasible, particularly when small businesses with limited staffs are involved.

Despite the benefits of exclusivity, however, exclusivity clauses can be subject to attack as anti-competitive because such clauses have the effect, at least on some level, of restricting the participating parties from competing for work. This is not to say that exclusivity is unenforceable under the law, and whether an exclusivity clause violates the antitrust laws depends on the nature, extent, and impact of the teaming activity.

In April 2000, the DOJ and the FTC jointly issued "Antitrust Guidelines for Collaborations Among Competitors.[2] This guidance provides for two lines of analysis for evaluating the competitive impact of competitor collaborations: (1) *per se* analysis, and (2) "rule of reason" analysis. A *per se* analysis involves agreements that are "so likely to harm competition and to have no significant pro-competitive benefit" that they are deemed *per se* unlawful. An example of a *per se* unlawful teaming agreement is one that would always or almost always tend to raise price or reduce output, such as through price fixing or bid rigging. However, most teaming agreements are not *per se* illegal and are evaluated using the rule of reason analysis. That analysis involves a factual inquiry into the agreement's overall competitive effect given its particular terms and market circumstances. At the heart of the inquiry is weighing the pro-competitive benefit of the teaming agreement against the competitive harm that the agreement may cause.

[2] *See* https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

The agencies charged with policing anti-competitive behaviors, including the FTC and DOJ, have noted the benefits of collaborative efforts between companies. They recognize that, to compete in today's marketplace, companies that are competitors in some situations might need to collaborate as teammates in other situations. Nonetheless, increasing consolidation in the defense industry caused the FTC and DOJ to issue a joint statement on April 12, 2016, to explain their standard of antitrust review of proposed transactions within the industry. In this statement, they re-pledged their vigilance, in cooperation with the Department of Defense (DoD), to ensure that consolidation does not make it harder for DoD to acquire needed equipment and services at competitive prices in current and future procurements. The agencies also noted the need to promote "robust" competition at both the prime and subcontractor levels of the Government procurement process.

The joint DOJ-FTC statement also refers to potential anti-competitive effects of team arrangements and other joint business arrangements. As noted above, concern over the potential anti-competitive effects of team arrangements is not new. This attention has grown, however, because competition for large procurements has often become team versus team rather than company versus company and because of increased consolidation within the defense industry.

There is a tension between the Government's recognition that teaming agreements can serve a legitimate business purpose and its concern about the potential anti-competitive nature of these agreements. The DOJ-FTC joint statement is an important reminder that contractors need to consider the potential effects on competition when they consider team arrangements, particularly exclusive ones, in the pursuit of Government contracts, and should do so prior to formalizing a teaming relationship. They should also consider and properly document the rationale for and expected benefits of the arrangement, including any pro-competitive benefits and need for a committed or exclusive one. Finally, contractors should also be aware that some agencies have supplemental FAR clauses that either require disclosure of exclusive arrangements or expressly prohibit them.[3] Therefore, it is important to carefully review the RFP and incorporated FAR clauses to ensure that any proposed exclusivity is consistent with the RFP's terms.

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[3] *See*, *e.g.,* 48 C.F.R. § 5252.215-9505, Exclusive Teaming Arrangements That Inhibit Competition (NAVAIR) (Oct. 2005):

> Offerors who propose teaming arrangements on an exclusive basis will be evaluated to determine whether such teaming agreements inhibit competition. In order for the Government to evaluate whether the proposed agreements inhibit competition, offerors are required to (1) provide a copy of all teaming arrangements, and (2) explain why the teaming arrangements do not inhibit competition. The documentation must include, but is not limited to: structure of the teaming arrangement, responsibilities, and liabilities; financial responsibility; managerial responsibility and accountability; and applicable legal documents. The burden of proving that any exclusive teaming arrangement proposed does not restrict competition shall rest with the offeror. Offerors are advised that should the Government determine that any such proposed, exclusive teaming arrangement inhibits competition, (1) that determination may render the offeror's proposal ineligible for award, and (2) the Contracting Officer shall forward the matter to the appropriate authorities as prescribed by Federal Acquisition Regulation Part 3.3.

Enforcement Issues

A. Introduction

Until the parties execute a formal subcontract, the relationship between an intended prime contractor and subcontractor is frequently governed by the parties' teaming agreement. Sometimes, however, parties are unable to reach an agreement on the terms of the subcontract. At that point, the question arises whether the teaming agreement itself, absent an executed subcontract, is an "enforceable" contract. The answer depends in part on the particular terms and phrasing in the teaming agreement and applicable state law. Because teaming agreements are often entered into months or even years before a formal solicitation has been issued (and almost always before the submission of proposals, revised proposals, and discussions with the Government customer), specific terms such as price, quantity and/or duration must often be left for future negotiation, after the terms of the final prime contract become known. This "incompleteness" of the teaming agreement is what has led some courts to treat particular teaming agreements as unenforceable "agreements to agree."

This section explores some factors courts consider in determining whether a teaming agreement is enforceable, and what provisions parties should include (and avoid) in their teaming agreements if they want to minimize the risk of unenforceability.

B. Choice of Law and Forum for Disputes

Although contractor teaming agreements are recognized under FAR 9.601 and are most commonly used in performing government projects, they are, fundamentally, agreements between two commercial entities and are subject to state rather than federal law.[4] Similarly, disputes under teaming agreements are most often adjudicated in the state court (or federal court applying state law) in the state where the agreement was formed or in which the parties agreed the dispute would be resolved. A common issue for a pre-award teaming agreement is enforceability. Generally speaking, the more specific and detailed the teaming agreement, especially with respect to the critical terms of price, quantity, and duration, and the more clearly the agreement states the parties' intention to be bound, the more likely a court will find the teaming agreement enforceable. However, judicial decisions on enforceability vary from state to state so that the Choice of Law and Choice of Forum provisions in a teaming agreement may prove crucial to the enforceability of the agreement and thus the ability to successfully pursue a contracting opportunity.

The following sections look at case law precedents (at the time of publication) in a variety of states whose courts hear teaming agreement disputes in the government contracting environment.

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[4] *See, e.g.*, *EG&G, Inc. v. Cube Corp.*, 63 Va. Cir. 634 (Va. Cir. Ct. Dec. 23, 2002).

1. Virginia Law

Under Virginia law, for a contract to be enforceable there must be mutual assent by the contracting parties to terms reasonably certain under the circumstances. Mere "agreements to agree in the future" or "agreements to negotiate at some point in the future" are too vague and indefinite to be enforced as a contract.[5] Accordingly, Virginia courts (including two Virgian Supreme Court decisions and a federal district court decision applying Virginia law) have found teaming agreements, when read as a whole, did not create enforceable post-award obligations on the prime contractor to award subcontracts to a teammate.

In *Navar, Inc. v. Fed. Bus. Council*, 291 Va. 338, 784 S.E. 2d 296 (Va. 2016), the Virginia Supreme Court followed prior Virginia Supreme Court precedent,[6] similarly finding that the teaming agreement at issue was merely an agreement to negotiate at a future date, and therefore an unenforceable "agreement to agree." The teaming agreement did not contain a sum certain, or any reasonably certain method for determining a sum certain, or any requirement that the subcontractor would be the actual subcontractor hired by the contractor upon award of the prime contract. Further, there were no written agreements governing the alleged workshare split between the contractor and subcontractor, but merely e-mail exchanges mentioning workshare percentages. While the teaming agreement stated the contractor would receive at a minimum, "51% of the labor hours and labor dollars," the Court noted this simply may have reflected the requirement in 13 C.F.R. § 125.6(a)(1) that in a set-aside contract the small business prime contractor must perform at least 50 percent of the personnel cost incurred with its own employees. *Id*. at 347.

In *CGI Fed. Inc., v FCi Fed., Inc.*, Record No. 170617 (Va. S. Ct. June 7, 2018), the Virginia Supreme Court affirmed a lower court's decision to set aside a jury verdict for $12 million in damages arising out of breach of contract and fraudulent inducement claims. The Virginia Supreme Court found that an "amended teaming agreement did not create any enforceable obligation for FCi to extend a subcontract with a 41% workshare and 10 management positions to CGI." Relying on its 2016 decision in *Navar, supra,* the Court found that the amended teaming agreement, read as a whole, did not create any enforceable post-award obligations for FCi to extend work to CGI as a subcontractor and that, at most, the amended teaming agreement imposed a framework for good faith negotiations of a final subcontract. The Court determined that the teaming agreement included language that expressly conditioned the formation of a subcontract on future events and negotiations and included other terms that indicated that a relationship might terminate without formation of a subcontract.

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[5] *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F. Supp. 2d 572, 578 (E.D. Va. 2013), *aff'd*, 549 Fed. Appx. 211 (4th Cir. 2014) (quoting *W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 254 Va. 514, 493 S.E. 2d 512, 515 (1997) and *Beazer Homes Corp. v. VMIF/Anden Southbridge Venture*, 235 F. Supp. 2d 485, 490 (E.D. Va. 2002)).

[6] *W.J. Schafer Assocs. v. Cordant, Inc.,* 254 Va. 514, 520, 493 S.E.2d 512, 515 (Va. 1997).

Specifically, the Court determined that the amended teaming agreement contained several provisions that expressly conditioned the formation of a subcontract on future events and negotiations which, the Court concluded "make clear the parties never agreed to the final terms of a subcontract." For example, the Court found that the Statement of Work provision regarding CGI's post-award workshare was subject to the final solicitation requirements of the awarded contract. Similarly, it pointed to the amended teaming agreement's requirement that parties enter into "good faith negotiations for a subcontract . . . subject to applicable laws, regulations, terms of the prime contract and . . . [CGI's] best and final proposal to FCi;" and the provision for termination of the teaming agreement if the parties could not reach an agreement on the terms and conditions of a subcontract within 90 days of award of a prime contract as evidence that the parties' "contemplated [that] a subcontract may not materialize after the prime contract award to FCi and [had] created a mechanism for ending their relationship." Finally, the Court also stated that just as CGI could not rely on the teaming agreement to get a subcontract from FCi, "FCi could not have relied on the agreement to require CGI to perform work as a subcontractor."

Further, the Court found that the CGI could not recover damages on its fraudulent inducement claim because CGI was not entitled to lost profits on a subcontract in which the final terms were uncertain and unenforceable. The Court held that "lost profits are not recoverable for a fraudulent inducement claim when they are premised on the unenforceable provisions of a contract;" here, the unenforceable post-award provisions of the amended teaming agreement. The Court also noted that CGI proved the existence of its lost profits based on the amounts it would have earned under the subcontract. The Court, however, concluded that because the final terms of the subcontract, including CGI's workshare, were uncertain (subject to negotiations and contingencies), any damages based on lost profits under the prospective subcontract were therefore also uncertain and not recoverable.

Finally, the Court affirmed the lower court's entry of summary judgment in favor of FCi on CGI's unjust enrichment claim under which CGI sought to recover the expenses it incurred in helping FCi prepare the proposal and any profits that FCi realized from performing the work it had promised to CGI. The Court rejected CGI's claim on the basis that the amended teaming agreement created an enforceable express contract that governed the parties' relationship in preparing the proposal for the State Department contract. For example, the amended teaming agreement set forth reciprocal obligations related to proposal preparation and negotiation of a subcontract and included provisions that required the parties to bear their own costs of performance and precluded them from recovering lost profits for a breach of the amended teaming agreement. As a result, the Court determined that CGI, as a victim of fraudulent inducement, was entitled to either rescind the contract or affirm the contract and sue for damages. The Court held that CGI was not entitled to recover on its quasi-contract claim because CGI sued for contract and tort damages and therefore, it affirmed the amended teaming agreement and agreed to be bound by its provisions, which expressly barred the recovery of lost profits or expenses incurred to prepare the proposals.[7]

A typical teaming agreement may be entered into well before the RFP has been issued and at the time of formation issues such as whether the teammate improves the ability to win the award and whether the teammates can work together will predominate over considerations of enforceability. However, the Court's decisions in *CGI* and *Navar* demonstrate that enforceability can be a significant issue if one party seeks to require its teammate to meet certain of its obligations under the teaming agreement or to recover damages for its failure to do so. Given this uncertainty, the companies entering teaming agreements should consider exploring alternative choice of law provisions that are more hospitable to the enforcement of teaming agreements.

Contractors should also consider drafting teaming agreements that are as specific as possible regarding the terms of the anticipated subcontract and that limit or avoid provisions that condition the formation of a subcontract on future events and negotiations. However, accomplishing this can be difficult if the program's requirements are not known or finalized at the time the parties negotiate the teaming agreement so that it may be difficult to negotiating a teaming agreement early in the pursuit of a contract opportunity that will be fully enforceable in Virginia.

The decision of the US District Court for Eastern District of Virginia in *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F. Supp. 2d 572, 578 (E.D. Va. 2013), *aff'd*, 549 Fed. Appx. 211 (4th Cir. 2014), may provide some guidance for developing a potentially enforceable teaming agreement. There, the District Court, applying Virginia law, struck down a teaming agreement as an unenforceable agreement to agree where, looking at the agreement as a whole, the Court concluded that the parties did not manifest an intent to be bound by the agreement. In reaching that result the Court cited the several elements of the teaming agreement (similar to those in the FCi/CGI teaming agreement) as evidence that the parties contemplated that a formal subcontract would have to be negotiated and executed and that the future transaction "might not ever come to fruition." *See* 939 F. Supp. 2d at 575-75, 581-82. In that regard, the District Court's interpretation of Virginia law as applied to the teaming agreement at issue was consistent with the Virginia Supreme Court's decision in *CGI*. However, in setting out the facts of the case, the District Court noted the teaming agreement at issue was the second of two teaming agreements between the parties relating to contract opportunities with the Office of Personnel Management. Although the first teaming agreement was ***not*** at issue in the case and the Court did ***not*** otherwise discuss its enforceability, its discussion of that agreement provides an interesting contrast with the second, unenforceable, agreement. In particular, the Court observed that the first teaming agreement:

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[7] The Court's opinion (at n.1) recognizes that the typical contractor teaming agreement can create an enforceable express contract relating to the preparation a proposal and negotiation of a subcontract, and therefore leaves open the possibility of a breach of contract action for failure to conduct good faith negotiations for a subcontractor after the award of a prime contract.

- Had several attachments, including (i) a Statement of Work, which "specifically covered provisions including the period of performance, place of performance, the requirement for key personnel, the format of the contract [IDIQ], and project management requirements for the work that Cyberlock would be performing for [the prime contractor]," (*see id*. at 574), ***and*** (ii) "the specific subcontract" that parties intended to enter following award of a prime contract, id. at 574-75;

- Provided that the prime contractor "'will . . . enter into the subcontract attached to this Agreement as Exhibit D" within five business days of award of the task order to the prime contractor. *id*.; and

- Identified a number of events that would result in its termination, but "none of [them] was the failure of the parties to successfully negotiate a subcontract." *Id*.[8]

Contractors should consider including the above-described provisions and the provisions identified in Section C in their teaming agreements to address some of the shortcomings in the teaming agreements in *CGI*, *Navar* and *Cyberlock* that were found to be unenforceable under Virginia law, but contractors should be aware that these provisions do not ensure enforceability

2. .District of Columbia Law

While there is limited DC case law concerning enforceability of teaming agreements, the United States District Court for the District of Columbia provided supporting precedent for interpreting such agreements as enforceable contracts in *Sabre Int'l Sec. v. Torres Advanced Enter. Sols., Inc.*, 857 F. Supp. 2d 97, 98 (D.D.C. 2012). In *Sabre*, the District Court interpreted the terms of a teaming agreement in determining whether the mandatory alternative dispute resolution provision applied to the prime contractor's counterclaim for breach of the teaming agreement against its subcontractor. In doing so, the court treated the teaming agreement as a contract, applying traditional principles of contract interpretation, thus implying the enforceability of the teaming agreement itself.

3. Maryland Law

Like Virginia, Maryland courts have found certain teaming agreements to be unenforceable agreements to agree. Under Maryland law, an essential prerequisite to the creation or formation of a contract is a manifestation of mutual assent, which requires a showing of: (1) an intent to be bound and (2) definiteness of terms. Under Maryland law, the parties' failure to agree on an essential term of a contract "may indicate that the mutual assent required to make a contract is lacking," and where parties do not intend to be bound until a final agreement is executed there is not an enforceable contract.

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[8] The Court also noted that the parties executed the subcontract attached to the teaming agreement on the same day as the prime contract award and that Cyberlock subsequently completed performance.

A Maryland appellate court addressed the enforceability question in *Advance Telecom Process, LLC v. DSFederal, Inc.*, 119 A.3d 175 (Md. App. 2015). Applying the above principles and looking to other jurisdictions for persuasive authority, the court found that the teaming agreement at issue left material terms for future negotiation, constituted an agreement to agree on a future subcontract, and did not include an enforceable requirement that the prime contractor issue a subcontract to the subcontractor.

The court acknowledged that, as in *Cyberlock*, some of the teaming agreement language suggested a binding obligation. The agreement provided that upon award, the prime "will issue a Subcontract" to the subcontractor and "will use best efforts to award" the subcontractor the specified target work share. However, the court concluded that the remainder of the teaming agreement, read as a whole, indicated that the parties did not intend to create a binding obligation to issue a subcontract, but rather, as in *Cyberlock*, set forth an agreed framework for negotiation of a future subcontract. The court concluded that the teaming agreement provisions stating (1) that if the prime was awarded the contract, the parties would "negotiate in good faith" a subcontract agreement, and (2) that approval of the contemplated subcontract by the client might be required, made it clear that there was no binding agreement in place and that the parties envisioned future negotiations before executing an enforceable subcontract. In a footnote, the court added that the teaming agreement's failure to include material terms, such as the specific services the subcontractor would actually perform and what the subcontractor would be paid for those services, was further support that there was no mutual assent regarding a contract.

4. New York Law

Under New York contract law, case law suggests that every material term must be agreed upon in order to form a binding contract, and that courts will not enforce a contract if price negotiations are left to a future date. However, to be enforceable, a contract does not need to spell out an exact dollar amount, as long as the contract provides a method of ascertaining the price.

In *Trianco LLC v. Int'l Bus. Machines Corp.*, 271 F. Appx. 198 (3d Cir. 2008), the U.S. Court of Appeals for the Third Circuit reviewed the enforceability of an executed teaming agreement under New York law, where the parties disputed whether the prime contractor had a binding obligation to issue a subcontract at the price the subcontractor proposed. The court concluded that, because the parties' teaming agreement did not define the subcontract price and left it to future negotiations, the teaming agreement was unenforceable. Instead, the court said that, at most, the parties could be ordered back to the bargaining table to negotiate a subcontract price "tabula rasa" in good faith, where the agreement required the parties to do so.

In reaching this conclusion, the court relied on the fact that the teaming agreement did not include a definite or approximate subcontract price, or even an objective method to ascertain a price. The agreement merely provided a method to determine a price ceiling "at prices that do not exceed" the amount submitted by the subcontractor during the proposal preparation. The court concluded that such a price ceiling is "far from providing the definiteness required by New York law," distinguishing other cases providing objective or external methods for allowing a calculation of a final price without further negotiation. Looking only to the four corners of the agreement, the court concluded it was clear that the parties' objective intent was to leave negotiation of the subcontract price until after prime contract award, noting (a) that the teaming agreement provided that the parties would negotiate the subcontract "in good faith," (b) that the agreement would terminate in the event of unsuccessful negotiation and execution of a subcontract within a reasonable period after award, and (c) that the agreement contemplated competitive negotiations, giving the subcontractor only a right of first refusal to perform contract work conditioned upon offering "competitive pricing," "availability of competent resources," and "an acceptable plan/strategy." While the court acknowledged that the teaming agreement included seemingly mandatory subcontract language, asserting that upon award of the prime contract the prime contractor "will" or "shall" award a subcontract to the subcontractor, the court concluded that such language alone was insufficient to create a binding contract in the absence of a fully agreed-upon price. The court acknowledged, however, that under New York law a price term may be sufficiently definite to be enforceable if the amount can be determined objectively without the need for new expressions by the parties, such as where the amount can be found within the agreement or ascertained by reference to an extrinsic event, commercial practice or trade usage.

5. California

In contrast to the other states discussed, California law appears favorable to the enforceability of teaming agreements. Under California law, an oral agreement to team even without a written teaming agreement has been held to be enforceable. In *Cable & Computer Technology Inc. v. Lockheed Sanders, Inc.*, 214 F.3d 1030 (9th Cir. 2000), the U.S. Court of Appeals for the Ninth Circuit considered the enforceability of an oral agreement to enter a teaming agreement, finding that an exchange of oral promises to team (and submit a bid as a team), supported by consideration, established an enforceable oral contract. The court stated that, unlike an agreement to agree, "an agreement to use best efforts to achieve a common objective is a closed, discrete, and actionable proposition." *Id*. at 1035.

While the court went on to say that the oral agreement was not itself a teaming agreement compliant with the terms of the solicitation, this decision provides a cautionary tale to contractors to avoid making promises to team with another company unless they are prepared to execute a formal teaming agreement.

6. Decisions by the General Accountability Office (GAO)

GAO lacks the jurisdiction to decide the enforceability of teaming agreements because its role is limited to addressing bid protests. But, given the frequent reliance on teaming agreements in government contracting, it is not surprising that GAO has addressed issues related to the sufficiency of teaming agreements to meet the requirements of an RFP. Consistent with its role of agency review, GAO has deferred to the procuring agencies' evaluation judgments regarding teaming agreements, including on issues of enforceability, so long as reasonable and consistent with the record.

AllWorld Language Consultants, Inc., B-414244, Apr. 3, 2017, 2017 CPD ¶ 111, and *Beretta USA Corp.*, B-406376.2, July 12, 2013, 2013 CPD ¶ 186, both reflect GAO's deference to agency judgments regarding teaming agreements, albeit in different procedural postures, with different contracting officer assessments of the sufficiency of the teaming agreements at issue to meet the requirements of the solicitation, and on whether the teaming agreements were merely agreements to agree. The RFQ in *All World* provided, *inter alia*, that the agency would not consider the experience of a proposed subcontractor unless the vendor submitted "evidence of a binding commitment" between the vendor and its proposed subcontractor. *AllWorld*, 2017 CPD ¶ 111 at 4. The awardee had submitted a rather typical contractor teaming agreement which, among other terms, provided that the quote to be submitted in response to the RFQ would include a proposed allocation of work between the parties. Specifically, the quote said that if a task order was awarded to the prime contractor, "'a mutually agreed subcontract(s) shall be negotiated between the Parties within sixty (60) days of the Prime's Contract Award,'" and that the "'Parties agree to negotiate in good faith toward the execution of a subcontract for the portion of the Program allocated to Subcontractor . . . consistent with the Statement(s) of Work, price, and terms and conditions of the prime contract(s) with the Customer.'" *Id*. at 5.

The protester challenged the contracting officer's determination that the teaming agreement was a "binding commitment," contending that it was only an agreement to agree and therefore did not satisfy the RFQ's requirement for a "binding commitment." GAO rejected that argument. In doing so, GAO essentially held that because the RFQ did not define the term "binding commitment" or how the requirement for such a commitment would be evaluated, the agency had discretion to determine whether the quotation met the requirement for a "binding commitment" and that the CO's conclusion that the teaming agreement satisfied that requirement was reasonable. *Id*. at 6. GAO also rejected the protester's argument, relying on *Cyberlock*, that the teaming agreement was unenforceable under Virginia law. In doing so, GAO summarily asserted that "the protester does not establish why GSA was bound by Virginia state law in interpreting the RFQ requirement for evidence of a binding commitment." *Id*. at 6, n.4; *see also Rohmann Servs., Inc.,* B-405171, Sept. 8, 2011, 2011 CPD ¶ 177 at 7 (2011) (rejecting protester's contention that the agency failed to evaluate or confirm the validity of a teaming agreement relied on by awardee on the ground that protester "failed to show that the solicitation required the agency to evaluate or validate offerors' teaming agreements, or . . . that the solicitation required offerors to submit their teaming agreements."); *Star Contract Servs., LLC*, B-409424, Apr. 23, 2014, 2014 CPD ¶ 133 at 5 (agency reasonably relied on teaming agreements that awardee voluntarily included in its proposal in evaluating the awardee's experience and past performance and as representing the work shares to be performed by two of its proposed subcontractors).

In contrast, in *Beretta*, GAO upheld the agency's judgment that teaming agreements submitted by an offeror did not satisfy an RFP requirement to provide copies of supply agreements with key suppliers to, *inter alia*, enable the agency to assess the offeror's ability to meet the contractual delivery schedule. Beretta's proposal did not include supply agreements with two key suppliers but rather included teaming agreements with them. The agency found that those teaming agreements were not sufficient to enable it to verify

Beretta's ability to meet the delivery schedule. *Beretta USA Corp.*, 2013 CPD ¶ 186 at 5-6. GAO upheld that judgment and in doing so, stated that "[t]he agency is correct that teaming agreements are in the nature of agreements to agree with respect to such things as delivery schedule." *Id*. at 6.

One take-away from these GAO decisions is that offerors that plan to rely on teaming agreements should carefully consider the sufficiency of those agreements to meet the requirements of the solicitation. Offerors also should consider that GAO will not re-evaluate matters related to reliance on teaming agreements in proposals if the agency's evaluation was reasonable and consistent with the terms of the solicitation and will defer to the contracting officer in such situations.[9]

C. Provisions for an Enforceable Teaming Agreement

In sum, there remains uncertainty as to the enforceability of teaming agreements in the Government procurement context because courts and GAO have issued opinions with conflicting views and because recent decisions in Virginia, whose law is frequently relied on in teaming agreements, have found certain teaming agreements to be "agreements to agree" and therefore unenforceable. At the same time, such pre-award agreements may be necessary to provide comfort to each team member that the resources necessary for performance would be available upon award. To reduce the risk of unenforceability (but not eliminate it) contractors entering into teaming agreements should consider including provisions like the following in their agreements.

- A Clause Reflecting the Parties' Intention to Form a Binding Agreement - While seemingly simple, the teaming agreement should specifically state that it is the intent of the parties to enter into a binding contract in accordance with the terms of the teaming agreement. This can be included in either the preamble, the body of the agreement, or both. The clause should state that the parties intend to work together as a team and be bound together in pursuing and performing the resulting contract, based on the unique skills and experience each partner brings to the relationship and the benefit each derives from the team arrangement. In addition to identifying the parties' unique skills and experience, the prime contractor could agree to name the subcontractor in the proposal submitted to the Government, which could reflect a further commitment to be bound by the teaming agreement.

- A Clause Setting Forth the Duration of the Teaming Agreement - The teaming agreement should include a clear statement concerning the duration of the teaming agreement.

- A Termination Clause – See discussion in Section XI

[9] *Metson Marine Services, Inc.*, B-299705, July 20, 2007, 2007 CPD ¶ 159 at 5 (citing *AHNTECH, Inc.*, B-295973, May 11, 2005, 2005 CPD ¶ 89 at 3; *Gemmo Impianti SpA*, B-290427, Aug. 9, 2002, 2002 CPD ¶ 146 at 3.).

- A Detailed Subcontractor Pricing Clause - See discussion in Section XI

- A Clause Identifying the Subcontractor's Workshare - See discussion in Section XI

- Mandatory Subcontracting Language - See discussion in Section XI

- Subcontract Agreement Terms - The parties should try to pre-negotiate as many essential terms of the subcontract as possible before the teaming agreement is executed. This could have two advantages. First, it could increase the enforceability of the teaming agreement. Second, it would likely facilitate the negotiation of a subcontract after award. The parties might also attach as an exhibit to the teaming agreement a copy of the proposed subcontract containing those terms, to be used as the subcontract upon award of the prime contract.

- Exclusivity - See discussion in Sections IX and XI

- Remedies – The parties may want to include a remedies provision that addresses a party's failure to enter into a subcontract agreement, to further demonstrate the parties' intention to be bound by the teaming agreement. Because the value of a potential subcontract may be difficult to determine, a liquidated damages provision may prove beneficial as a disincentive to reneging on teaming obligations and as a means to avoid contentious litigation over damages in such instances (although this too could be challenged as unenforceable).

While this Chapter provides general guidance related to certain provisions that could be included in teaming agreements to address and mitigate the risk to enforceability, each teaming arrangement and agreement must be evaluated under the applicable governing law, the specific terms of the teaming agreement, and the conduct of the parties. Given the varying ways in which teaming agreements are treated in different jurisdictions, we recommend that when drafting and negotiating a teaming agreement, the parties consult with Government contracts counsel to ensure the terms adequately protect the teaming relationship and support the parties' intent.

Negotiation Issues

A. Scope of the Teaming Agreement

A teaming agreement is an important contractual step in the relationship among two or more companies to pursue and, hopefully, win and perform a Government contract. It generally commits the parties to each other for the life of the procurement cycle and contract. In most cases, the relationship is exclusive, *i.e.*, in exchange for a portion of the contract work, the teaming partner agrees not to join a competitor's team for that competition. Therefore, teaming agreements should be entered into only after both parties are ready to commit to each other.

At a minimum, the teaming agreement should address the structure of the relationship, non-disclosure obligations, responsibilities for procurement support, and future subcontracting expectations. The teaming agreement will remain the governing contractual document until a subcontract is signed, which may be far down the road, if at all.

Teaming agreements often contain terms and conditions that go beyond these minimum obligations, including provisions normally found in the subcontract that will not even apply until after contract award. Why?

Think of the teaming agreement as the "engagement," the first step in what is intended to be a "marriage" (for the specific contract, at least). The parties have a spectrum of choices as to when they want to formalize their marriage "vows."

The prime contractor often wants to postpone the subcontracting process until after award. There may be good reasons to do so. After all, not all proposals are successful; if the team does not win the competition, efforts expended in negotiating subcontract terms for that program will be wasted. Prime contractors may understandably want to focus their subcontracting resources on those contracts that have been awarded (or have a high probability of being awarded). Worse still, subcontact negotiations can become a time-consuming and potentially a distraction during intense proposal preparation efforts.

But there also may be good reasons to include subcontract terms in a teaming agreement (or even execute a contingent subcontract before award). For example:

- The contract may impose short delivery schedules upon award, which may be difficult to meet unless the teams (and subcontract terms) are already in place. (This is the basis for allowing pre-contract costs under FAR 31.205-32).
- The enforceability of a teaming agreement (discussed in Section X above) will be enhanced if detailed subcontract commitments, such as pricing and workshare, are included.

- The bargaining position of the parties may change upon award, giving one party an incentive to negotiate important subcontract terms while it has greater negotiation leverage. For example, if a subcontractor is critical (or believes it is critical) to the team's win strategy, but fears it will be swapped out for a lower-price competitor after award, it will want the teaming agreement to include terms that protect its position. Conversely, if a prime contractor will depend upon the technology and skills of an irreplaceable team member to perform the contract, it will want the teaming partner fully committed to the program before the prime contractor submits a binding proposal to the Government.

B. Non-Disclosure Agreement (NDA)

The non-disclosure agreement (NDA) is typically the initial step in the teaming relationship. (Think of it as a "first date," which sometimes feels like a "blind date.") It can be part of a teaming agreement, but more often it will be executed while the parties are exploring whether to team, and then subsequently incorporated by reference into the teaming agreement. The NDA allows the parties to speak frankly.

The purpose of the NDA is to address the disclosure, dissemination, and control of the parties' technical and pricing information and proprietary data. Generally, the NDA will commit each party to maintain the confidentiality of the other party's proprietary information, define the scope of that commitment, and establish the procedures for carrying it out. Typical provisions include:

- Coverage: E.g., the NDA protects proprietary information that is disclosed in writing, orally or visually, and identified as proprietary at the time of disclosure.
- Purpose: E.g., the NDA allows information to be used only for the purpose of evaluating teaming possibility.
- Procedures: E.g., the NDA sets forth the procedures for turning over data, identifying data as proprietary, limiting dissemination and reproduction, and ultimately returning or destroying protected material.
- Level of Protection: E.g., the NDA might provide that "each party shall use the same means it uses to protect its own confidential proprietary information, but in any event not less than reasonable means, to prevent the disclosure and to protect the confidentiality" of covered documents.
- Exceptions: E.g., the NDA will not apply to information (i) already known by the other party without an obligation of confidentiality, (ii) publicly known, (iii) independently developed by the other party, or (vi) required to be disclosed by a Governmental agency or required to be disclosed by law.
- Disclaimer: E.g., the NDA might provide that neither party warrants the accuracy of the information disclosed.

- Third party disclosure: E.g., the NDA might specify circumstances under which protected information can be provided to the Government customer or to other team members.

If an NDA is executed in advance of a teaming agreement, it will not usually commit either party to team with the other, or prevent either party from "playing the field" and pursuing similar arrangements with other parties. Indeed, a prime contractor may sign NDAs with several potential (and competitive) teammates, and a potential subcontractor may sign NDAs with several potential primes. Doing so may require separate negotiating teams, however, to prevent "technology transfusion." Therefore, NDAs should not be entered into without appropriate care and review.

C. Other Important Teaming Agreement Terms

When negotiating the teaming agreement, it is important to remember that the prime contractor and subcontractor have different ultimate goals. The prime contractor wants to push down risks (and maximize its profit). The subcontractor wants to limit its risks (and maximize profits). Under this framework, it is best to look at negotiated terms and conditions not as "right" or "wrong," but as allocations of risk and reward. And these allocations are not necessarily zero sum. While the outcome will often reflect the parties' respective leverage – who needs whom more? - negotiatons will be more effective if each party understands (and respects) each other's goals.

1. Enforceability

The legal enforceability of a teaming agreement is discussed above in Section X. As noted, in determining whether a teaming agreement is enforceable, courts tend to look at the stated intention of the parties, the inclusion of essential subcontract commitments (such as price, quantity, schedule, and workshare), and the parties' conduct in reliance upon those commitments. The importance of the preamble to an agreement is often overlooked, but the preamble in the teaming agreement can help define the purpose and scope of the agreement, the limitation of the agreement (to avoid antitrust issues), and whether it is intended to be binding.

2. Exclusivity

As discussed in Section IX, a teaming agreement requires a foundation of trust. In the competitive Government contracting environment (and subject to the antitrust laws), exclusivity will usually make sense. It is difficult for parties not to operate at cross purposes if they actively support multiple teams in the same competition. Even where Original Equipment Manufacturers must be able to market to all competitors (for antitrust reasons), their marketing efforts, proposal or benchmark support, non-standard pricing or technology can be offered exclusively to one team.

A façade of unity, however, may hide a difference of interests. The prime contractor may want an exclusive commitment from the subcontractor, while preserving its own right to perform the work in-house or through a different subcontractor. This is not necessarily heavy-handed; remember that the prime contractor will be responsible to the end customer for overall contract performance at a reasonable price and arguably must keep aware of alternative sources in the event of subcontractor performance problems, defaults, or bankruptcy. In some instances the subcontractor may have similar desires – it may want to be the exclusive subcontractor of one prime contractor while preserving its right to team with other potential prime contractors.

The inclusion of an exclusivity clause may enhance the enforceability of the teaming agreement. In this regard, a statement that the teaming partners intend to enter into an exclusive arrangement provides consideration (in the form of foregoing the opportunity to team with others) and reinforces the idea that it is the intent of the parties to be bound by the terms of the teaming agreement. Such clauses reflect the parties' commitment to work only with one another for the given opportunity and may be an important point in the negotiation of the teaming agreement.

D. Procurement Support

The teaming agreement should clearly allocate the parties' responsibility to provide management, technical, and marketing support services to the proposal effort, and should state whether either party will reimburse the other for any of its costs (for example, if the teaming partner is a small business and cannot otherwise afford to provide necessary help). Typically, each teaming partner will be responsible at a minimum for proposal support relating to its portion of the scope of work.

The agreement should also specify which party has ultimate control over proposal activities and is responsible for pre-award communications with the Government. This is typically the prime contractor, unless the subcontractor has a superior marketing presence with the Government customer. The FAR provides, however, that the prime contractor may not unreasonably restrict the ability of the subcontractor to sell directly to the Government. FAR 3.503.

E. No-hire and Non-Solicitation Clauses

Teaming partners often work closely with each others' employees during the proposal period. Sometimes a teaming partner may be reluctant to commit its "A Team" to the program, despite a contractual obligation to do so, in fear that the prime contractor will "poach" its best people. Small companies are especially likely to have this concern because they can less afford to lose key personnel. This concern may apply during the subcontract performance period as well. Reflecting this concern, the teaming agreement (and subcontract) can include provisions prohibiting the parties from hiring (or at least soliciting) each others' employees – or at least those employees who participate in the procurement effort.

These provisions sometimes raise countervailing concerns, however. Strict "no-hire" provisions may be unenforceable in some states, and even no-solicitation provisions may dampen employee morale, who see such provisions as stifling their opportities. Moreover, these provisions are subject to abuse in both directions. Hiring companies may solicit but coach targets to apply at job fairs; conversely, employers may threaten to sue departing employees even when such suits are groundless, in order to "send a message" to remaining employees.

In October 2016, DOJ and the FTC issued "*Antitrust Guidance for Human Resource Professionals*" ("Guidance") to address "no poaching" and other agreements limiting competition for employees, including wage fixing agreements, suggesting that such agreements could present serious legal risks depending on the circumstances.

The Guidance focuses on agreements between competing companies (or "competing employers"), defined broadly as companies that "compete to hire or retain employees . . . , regardless of whether the firms make the same products or compete to provide the same services." (The Guidance, however, does not address "no hire" provisions with staffing agencies or the non-solicitation of company employee provisions which may be part of employment agreements.)

The Guidance states that "[a]greements among employers not to recruit certain employees or not to compete on terms of compensation are illegal," and it advises that DOJ and the FTC will aggressively pursue enforcement actions, both civil and criminal, against illegal "no poaching" pacts and other agreements that improperly limit competition for employees. The Guidance includes examples of previous enforcement actions against employers who have agreed not to compete for employees, as well as a set of Q&As addressing various scenarios.

While the Guidance states that "naked" no poaching agreements are "illegal *per se*" under antitrust laws, contractors should note that it suggests "no poaching" clauses, such as those typically found in contractor teaming agreements, might not be viewed as illegal *per se* if they are based on legitimate business needs for a collaboration or joint venture:

> [If] the agreement is separate from or not reasonably necessary to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects. Legitimate joint ventures (including, for example, appropriate shared use of facilities) are not considered *per se* illegal under the antitrust laws.

Nonetheless, even if not *per se* illegal, "no poaching" clauses in contractor teaming agreements could still be subject to antitrust scrutiny and enforcement and should be carefully considered before inclusion in an agreement.

Finally, the Guidance references another source, which is a list of red flags that companies should identify and assess in employment settings, such as the following examples:

- An agreement with another company about employee salaries or other terms of compensation, either at a specific level or within a range.

- An agreement with another company on other terms of employment.
- An expression to competitors that the companies should not compete too aggressively for employees.
- An exchange of company-specific information about employee compensation or terms of employment.
- Discussion of the above topics with colleagues at other companies, including during social events or in other non-professional settings.

F. Agreement to Negotiate the Subcontract

A critical provision of the teaming agreement is the extent of the mutual commitment to subcontract after contract award. A typical provision may provide a commitment to negotiate in a good faith a subcontract upon award that would be consistent with the terms of the contract and teaming agreement. This provision provides greater flexibility to the prime contractor, with little protection to the subcontractor, but puts the enforceability of the entire teaming agreement at risk. Thus, the wording of this provision will have a significant impact on the legal enforceability of the teaming agreement (or, more importantly, the parties' obligation to subcontract). To diminish the risk of unenforceability, the teaming agreement should include a clear statement of intent to subcontract and avoid language that suggests that the award to the proposed subcontractor is subject to the future "negotiation in good faith" of the terms of the subcontract. At a minimum, the teaming agreement should include a mandatory statement that, in the absence of government intervention, a subcontract "will" and/or "shall" be awarded to the subcontractor if the prime contractor wins the award.

Where the Government must approve the choice of subcontractor, the teaming agreement (or at least the obligation to subcontract) must be subject to the Government's approval. Note that the subcontract type does not have to match the prime contract type – fixed priced subcontracts can be appropriate even if the prime contract is cost reimbursement, and the reverse can also occur (although a fixed price prime contractor will generally not want the uncertainty and risk of a cost plus subcontract). And remember that the FAR encourages prime contractors to use commercial items subcontracts, whether or not the prime contract is awarded under FAR Part 12. This puts a premium on the sophistication of the prime's subcontract negotiators, who must be "empowered" to recognize commercial items subcontractors and not feel they must follow the by-the-book admonition: "No one ever got fired for putting unnecessary clauses into the subcontract."

G. Subcontract Pricing

An understanding on how pricing will be handled is fundamental to the team's ability to go forward. Prior to award, it may be premature for the parties to agree to specific pricing and the subcontractor may not want to disclose its forward pricing, which could reveal its pricing and product strategy. But the parties can agree that the team will jointly develop competitive pricing models. Or the subcontractor may commit to offer "most favored nation" pricing.

As identified above in Section X, some courts have found the failure to include subcontractor pricing fatal to the enforcement of a teaming agreement. As such, the agreed-upon subcontract pricing methodology and format should be consistent with the solicitation or prime contract requirements. This may mean unit prices rather than prices for "suites" of products, or bundled prices that include services like installation, training, maintenance. To further reduce the risk of unenforceability, the teaming agreement should include a clear statement of subcontract pricing or, if the price cannot be determined in advance of the prime contract award, a definitive method for future determination of pricing (or at least a price range) after award. One possible approach might be to specify a subcontract price but allow for adjustments to that price to reflect changes in the scope of work, prior to award or in the contract as awarded or changes to the final prime contract price. For example, the teaming agreement could specify that if the applicable portion of the final prime contract price is reduced, the subcontract price will be reduced by the same percentage. Another option might be to delegate the determination of a subcontract price to an arbitrator in the event the parties are unable to agree. A court could then enforce the price determination of the arbitrator.

H. Organizational Conflicts of Interest

In today's team vs. team Government marketplace the potential for organizational conflicts of interest (OCIs) must be addressed at the beginning in the relationship. OCIs and potential OCIs can involve all team members, and mitigation plans will generally apply to all team members. Therefore, teams must exercise due diligence to identify situations where any team member (or employee of a team member) has been exposed to non-public information that would be competitively useful, where any team member (or employee) has provided any input into the solicitation, or where contract performance (particularly involving advice and recommendations) could affect a team member's other business interests. These situations are not necessarily disqualifying, but many teaming agreements identify OCIs as a basis of termination of the agreement. To that end, potential OCIs require careful analysis and an OCI mitigation plan that is acceptable to the contracting officer.

I. Disputes

The teaming agreement should include a provision governing how disputes between the teaming partners will be resolved. Even though the agreement may not ultimately be legally binding, the parties need a mechanism to resolve issues that arise. Typical dispute provisions include executive level review and/or alternative dispute resolution procedures such as arbitration or mediation. Note that the FAR's Disputes clause cannot be used because the Government is not a party to the agreement and the Contract Disputes Act does not apply.

J. Termination

The teaming agreement should contain termination provisions. Typically, a teaming agreement will terminate (a) when it is replaced by a subcontract (either before or after contract award), (b) if the deal is cancelled or awarded to a different team (and the protest period has passed), (c) if the team is not included in a competitive range determination, (d) if the prime elects to no-bid the solicitation (though the subcontractor will want that decision communicated early enough to give it the opportunity to join another team); or (e) if (after a good faith effort by the prime) the Government does not approve the team member. These are objective events and rarely raise disputed issues.

Disputes arise, however, when the basis for termination is subjective, such as if the party has serious ethical problems or a potential conflict of interest, or if the parties cannot successfully negotiate a subcontract. When the parties fail to agree on subcontract terms, one party will often accuse the other of not negotiating in good faith. Disputes also arise if the contract requirements have changed and the prime feels that teaming no longer makes sense.

Parties should be aware that provisions making the inability of the parties to reach an agreement on the terms of a subcontract – an event that terminates the teaming agreement – may cause a court to conclude that the teaming agreement is unenforceable due to the implicit acknowledgement that such negotiations may fail. To address those concerns, parties should considering limiting termination clauses to a minimum.

K. Other provisions

Other standard teaming agreement provisions include descriptions of the parties' relationship as independent contractors or joint venturers, choice of law, notice requirements, indemnification against Government or certain third party claims, and commitments to comply with government ethics laws and regulations, including those relating to procurement integrity, bribery and gratuities, and kickbacks.

L. Terms That Relate to Subcontract Performance

As noted above, there are times when the parties will want the teaming agreement to include terms that relate to the post-award, subcontract period.

1. Subcontract Workshare

Teaming partners will often want to nail down the subcontract workshare. It is easiest to define this workshare when the subcontractor will be responsible for a particular part of the effort – e.g., a "requirements subcontract" for all Information Security requirements that arise under the contract. When this is not possible, however, the teaming partner may seek a guaranty of a specific percentage of the effort. This raises a number of issues. How will the percentage be measured, monitored and enforced? Should there be a floor, or a cap, on the amount of work performed by the subcontractor? Should liquidated damages be awarded if the percentage is not met? Is it sufficient for the subcontractor to have a "right of first refusal," however that might be defined? Where contract performance will require an integrated team, the agreement may also allocate "lead" and "support roles" for the parties. As a general rule, the more the parties can memorialize their expectations and the details of how the contract will be administered, the easier it will be to avoid future disputes.

In multiple-award, task order driven contracts (a/k/a "hunting licenses"), the parties may consider including an "eat what you kill" provision, stating that the subcontractor will, at a minimum, have the right to participate in the performance of task orders which it successfully markets.

An underlying issue, however, is that the parties have potentially adverse interests. The prime contractor typically wants the right to replace an over-priced or poorly performing sub, or if the customer requirements change and the subcontractor cannot respond competitively to the new requirements. This can easily happen in technology-driven acquisitions with long procurement cycles. The subcontractor, of course, wants protection from replacement. This shouldn't be considered in a vacuum - the teaming partners may have other opportunities to work together, in the present or in the future, and no company wants to be known for shirking its responsiblities. Careful upfront consideration is necessary to minimize, and hopefully avoid, such situations.

As demonstrated in Section X, there is an increased risk that a court will find a teaming agreement to be an unenforceable "agreement to agree" where the parties have not clearly agreed on the work to be performed by each party, or where the workshare allocation has been left to future negotiation. Parties should therefore include in their teaming agreements a description of the workshare, along with sufficient terms and conditions to permit the parties to work together under the prime contract. Specifically, parties should clearly define the scope of work for each party, detailing the specific services and materials to be provided and the relationship, duties, and responsibilities of each party, both during the proposal preparation period and during performance of the contract after award. Merely providing a scope of work "as presently understood by the parties" is not sufficient in Virginia and may not be in other jurisdictions as well. Attaching a Statement of Work to the teaming agreement that covers the period of performance, place of performance, requirement for key personnel, and project management responsibilities, can further reduce the risk of unenforceability.

M. Flow Down of the Prime Contract's Terms

It is appropriate for the teaming agreement to provide that the subcontractor will accept prime contract provisions (as well as regulatory requirements) that apply to its scope of work. At a minimum, this will include performance requirements as well as FAR clauses that are mandatory flowdowns, such as the Anti-Kickback Act clause, requirements to submit cost or pricing data (which may be submitted directly to the Government, rather than to the prime), audit requirements, and representations and certifications. Note that flowdown of mandatory clauses is not automatic; the *Christian* doctrine, which reads into the prime contract certain mandatory clauses that were omitted, does not apply to subcontracts (with some potential exceptions).

- Normally, the prime contractor wants to flow down all prime contract requirements and penalties that relate to the area of subcontract performance, including liquidated damage provisions and maintenance credits. The prime contractor wants to match the terms and conditions in the prime contract and subcontract so that it is not caught in the middle.

- Subcontractors, however, may not want to step up to prime contract risks, especially if they involve the actions of other parties (e.g., other subcontractors) over whom they have no control. Damages provisions may have to be allocated if many parties are involved.

- The teaming partner should be willing to sign up for and adhere to the applicable prime contract requirements or in the alternative, identify its exceptions in a timely manner. Conversely, the prime contractor must provide the subcontractor with appropriate notice of these requirements and the opportunity to take exception. Ultimately, the prime contractor must have the right to decide whether it (i.e., the prime contractor) will accept a contract requirement, but it cannot bind the subcontractor without the subcontractor's agreement.

- Certain prime contract provisions are not mandatory flow downs as a matter of law or regulation, but are necessary flow downs from a business perspective. These include the Changes, Termination for Convenience, and Stop Work clauses. A failure to include such clauses in the subcontract would expose the prime contractor to serious harm in the event of a unilateral Government change order, stop work order, or convenience termination relating to the subcontractor's scope of work. A contractor without the corresponding Changes Clause in the subcontract would risk not being able to perform the changed work. A contractor without a termination for convenience or stop work order provision may have to defend an action for breach of contract after the Government's termination for convenience or stop work order. Thus, a reasonable teaming partner should agree to accept such subcontract flow downs, at least to the extent they involve Government action. Teaming partners can, however, reasonably limit their agreement to changes, terminations and stop work orders resulting from Government action, rather than giving the prime contractor unbridled discretion to make unilateral changes or terminate for its own convenience.

- Award fee contracts raise other issues. Should major subcontractors share the award fee performance risk? How closely can a subcontract award fee be tied to the prime contract award fee, which may be based on performance measures over which the subcontractor has limited control?

N. Limitation of liability

Limitation of liability provisions typically limit recovery to direct damages, and bar claims for lost profits, business interruption, lost opportunity, or consequential or punitive damages. Some clauses cap exposure at the subcontract price. Meaningful negotiation of these provisions requires an understanding of the consequences of breaches or mistakes, including loss of business opportunities or termination for default.

While limitation of liability provisions are principally relevant to the subcontract, they may be subject to serious negotiation if the subcontractor fears the possible impact from the loss of its "crown jewels." Where proposal preparation requires the subcontractor to disclose proprietary data or software, it may view the loss or disclosure of its data as an existential risk, and be unwilling to exclude claims for consequential damages. In such event, it may be best to try to define the potential scope of those "consequential damages," include a dollar ceiling, or, better still, develop a workaround that does not require disclosure of the "crown jewels" in the first place.

O. Provisions for Agreements with Critical Team Members

There are times when a prospective teaming partner is indispensable to the performance of the contract, as for example when the teaming partner will provide important services that cannot reasonably be replaced, or when the prospective teaming partner will provide critical proprietary software or other irreplaceable products. In such cases, the prime contractor may want the teaming agreement to include stronger performance commitments and protections, particularly if the prime contractor has not previously teamed with the critical teaming partner or the teaming partner is a small business whose capability may be uncertain.

For this example, possible protections that the prime might seek to include the following:

- A reasonable opportunity to perform "due diligence" in order to verify the team member's capability to fulfill its responsibilities, which might include review of source code (under appropriate confidentiality protections) for any software that is critical to the program, confirmation of the critical teaming partner's ownership of critical intellectual property, or a review of the team member's financial capability.

- A detailed description of the critical team member's responsibilities defined in the same detail as they are defined in the solicitation, including service level agreements or other performance metrics and any related penalties. (This is normally included in the subcontract; including it in the teaming agreement protects the prime from being subject to a "bait and switch" after it has made a binding contractual commitment to the Government.)

- The placement of any critical source code owned by the subcontractor into an appropriate escrow, with provisions that permit access to the source code by the prime in the event that the subcontractor fails to perform its responsibilities in a successful manner.

- Government claims indemnification, providing that the subcontractor will indemnify the prime against any damages, costs, credits or charges assessed by the Government due to the fault, act or omission of subcontractor, including the subcontractor's failure to meet Service Level Agreements or other performance metrics, as well as a carveout of such indemnification from any limitation of liability provision.

- Liquidated damages for withdrawal from the team.

P. Summary Points Related to Teaming Agreement Negotiations

In conclusion, below is a summary of key "take aways" for negotiating teaming agreements:

- Prime contractors and subcontractors have different goals. Understand them.

- In negotiations, don't be trapped by "policy" – consider the specific situation.

- Positions are not right or wrong, but reflect an allocation of risk and reward.

- Each party's respective leverage matters, and may change with time.

- Consider what issues will be best resolved in the teaming agreement and which issues should await subcontract negotiations.

- Seek win-win opporutnities.

GSA Contractor Teaming Agreements

A General Services Administration (GSA) Contractor Team Arrangement (CTA) allows two or more GSA Schedule contractors to work together to meet requirements of Government agencies that they might not be able to satisfy independently. It allows agencies to procure a total solution that combines the supplies or services from the team members' separate GSA Schedule contracts, rather than making separate buys for each part of a requirement. GSA Schedule contractors can compete for Schedule orders for which they would not otherwise qualify, allowing them to increase their market share, improve their competitiveness, reduce risk by sharing responsibilities with other team members, and leverage their small and/or disadvantaged business status.

The FAR and General Services Administration Acquisition Manual (GSAM) do not define or prescribe requirements for CTAs. GSA's website nonetheless includes guidance that addresses the formation and operation of CTAs. This guidance should be reviewed carefully and followed.[10]

A. Formation of CTAs

As a threshold matter, each member of a CTA must have a GSA contract under the applicable Schedule and, if specified, Special Item Number under that Schedule. *See Veterans Healthcare Supply Solutions, Inc.*, B-409888, Sept. 5, 2014, 2014 CPD ¶ 269. In addition, the CTA cannot conflict with the underlying terms and conditions of the GSA contracts. While there is no prescribed form for CTAs, the GSA requires them to be in writing and provides detailed guidance on their form and content, including identifying a number of points that should be addressed in a CTA.[11] According to the GSA guidance, a CTA should:

- Include the name, address, GSA Schedule contract number, telephone number, and point of contact for each member.
- Be signed by each member.
- Identify the team lead and set out the duties and responsibilities of the team lead and of each team member in performance (e.g., delivery) and for other team obligations (such as warranties).

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[10] *See* General Services Administration, *Contractor Team Arrangements*, http://www.gsa.gov/portal/category/100647; *Elements of a CTA Document*, http://www.gsa.gov/portal/content/202253; *GSA Multiple Award Schedules Desk Reference*, V.7, § 10, https://www.gsa.gov/acquisition/purchasing-programs/gsa-schedules/schedules-news-training/mas-desk-reference; *Contractor Team Arrangements FAQs*, http://www.gsa.gov/portal/content/202257.

[11] *See* General Services Administration, *Elements of a CTA Document*, http://www.gsa.gov/portal/content/202253.

- Identify the supplies and services and pricing being offered; all prices to the Government are to be at or below each member's GSA Schedule contract prices.
- Address invoicing and payment: GSA permits the "team lead" to invoice the Government on behalf of all team members, but recommends that each team member perform its own invoicing. If the team lead will invoice and receive payments, that must be clearly reflected in the CTA, and the CTA should provide that any dispute involving the distribution of payments will be resolved by the team members without any involvement by the Government.
- Identify any supplies and services being offered that are not on a member's Schedule contract (e.g., open market items); any such items may be provided only after all applicable acquisition regulations have been followed (e.g., FAR 8.402(f)).
- Provide that each team member is responsible for reporting its sales under its own Schedule contract and for paying the related Industrial Funding Fee to GSA.
- Avoid language that could be construed as creating a joint venture or other business arrangement. *See, e.g., Brooks Range Contract Servs. v. United States*, 101 Fed. Cl. 699, 716 n.16 (2011). Lack of clarity in this (or other) respect relative to the GSA guidance can create protest risks. *See, e.g., Quasars, Inc.*, B-405747, Dec. 7, 2011, 2012 CPD ¶ 272; *Computer Cite*, B-299858, Aug. 31, 2007, 2007 CPD ¶ 166.
- State that all team members remain independent contractors, responsible for their own employees.
- Include the name and address of the ordering agency and its primary points of contact.
- Identify and allocate project management fees or other costs associated with the CTA. (As noted above, prices and hourly rates quoted to ordering agencies cannot exceed those on the members' GSA contracts. GSA maintains that the benefits of a CTA may more than compensate for any additional costs associated with it.)
- Specify the duration of the team arrangement, and if applicable, address option periods.
- Address circumstances and procedures for replacement of team members, including the team lead. GSA's guidance states that "[t]he CTA document must also state that the team shall obtain the approval of the government prior to replacing any team members." General Services Administration, *Elements of a CTA Document*, http://www.gsa.gov/portal/content/202253.
- Identify any proprietary information and how it will be handled.

In addition to these elements, contractors should also consider provisions typically included in other teaming arrangements, such as:

- Indemnification
- Choice of Law
- Limitations of Liability
- Responsibilities in bid protests
- Dispute resolution
- Proposal Preparation Responsibility
- Non-Disclosure
- Non-Compete Clauses

B. Some Practical Considerations Regarding CTAs

Relationship of Team Members to the Government: One important difference between CTAs and other business arrangements used in Government contracting is that each member of a CTA has privity (a direct contractual relationship) with the Government. In comparison, a "traditional" team arrangement such as those under FAR Subpart 9.6 typically involves a prime contractor/subcontractor relationship, in which only the prime contractor enjoys privity with the Government. Likewise, in a joint venture, the JV is typically the contractor and the JV, rather than its individual members, has privity with the Government. The Government Accountability Office (GAO) and the Civilian Board of Contract Appeals (Board) have both recognized this feature of CTAs.

Because each member of a CTA has privity, each member is responsible for performance of the duties assigned to it under the CTA. Likewise, because each member of a CTA has a contractual relationship with the Government, each may assert a claim against the Government under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2016). *See Key Fed. Fin. v. Gen. Servs. Admin.*, CBCA Nos. 411, 412, 07-1 B.C.A. ¶ 33,555 (2007); *see also Lockheed Martin Aspen Medical Serv., Inc. v. HHS*, CBCA No. 329, 2011-1 B.C.A. ¶ 34,624 (2010) (following *Key Federal*]). In reaching that result, the Board in *Key Federal* relied on, among other things, the solicitation's references to the guidance on CTAs on GSA's website. That decision also teaches that contractors should carefully follow GSA guidance in structuring CTAs if they want to maintain the right to bring their own CDA claims.

Consistent with the principle that each member is in privity with the Government, GSA's guidance appears to provide that each CTA member should receive a separate past performance evaluation.

Approval of CTAs: GSA does not approve CTAs. However, GSA recommends that requests for quotations (RFQ) indicate that any CTAs that are used in responding to the RFQ must be specifically identified. GSA's guidance also indicates that an ordering activity may "identify deficiencies in the CTA in order to enhance the probability of successful performance."

Subcontractors: Team members may still use subcontractors as allowed by their GSA Schedule contracts and the solicitation. Those subcontractors, however, are not considered members of the "team" and do not have privity of contract with the Government, and the responsibility for subcontractor performance remains with the applicable team member.

Small Business Goals: Only one team member may receive credit toward an ordering agency's small business goals because the federal reporting system for tracking agency expenditures on small businesses allows the agency to associate only one contractor with each order. GSA's current guidance instructs agencies to associate small business participation with the CTA member receiving the most revenue from the order.

Small Business Set Asides: If a procurement is set aside for small businesses, GSA's guidance states that all members of the CTA must be small businesses to be eligible for the order (and, as noted above, all members must have GSA Schedule contracts). For purposes of the Limitation on Subcontracting Clause at FAR 52.219-14, the CTA team must perform 50% of the work. This means, for example, that in a team consisting of three members, the team leader could perform 20% of the work and the other two team members could each perform 15% of the work to meet the 50% requirement. In such a case, the remaining 50% of the work could be performed by subcontractors, including large business, who are working under any of the team members.

Timing of CTA Formation: Contractors can establish a CTA in advance of known requirements. The GSA notes that for non-complex buys, having a CTA "on the shelf" can enable members to respond quickly and easily to solicitations. The GSA also acknowledges that a customized CTA may be required for more complex buys.

Intellectual Property Issues That Can Impact Teaming Agreements

In general, the FAR and DFARS provide a well-developed regulatory framework for allocating rights in intellectual property, including non-commercial and commercial technical data and computer software, between the Government and its prime contractors. Under the FAR which applies to civilian Government agencies, and the DFARS, which applies to DoD agencies, the Government purchases licensing rights to intellectual property or technical data rights, rather than full title, with certain exceptions. In sum, the Government contract may authorize or grant the Government certain rights in technical data that is developed at the Government's expense or delivered to the Government as part of contract performance.

To that end, the teaming partners must adequately protect intellectual property and technical data that is owned or developed either jointly or separately, but delivered to the Government as part of contract performance. As such, the negotiation of contract clauses in a teaming agreement governing the teaming partners' respective rights in intellectual property, technical data rights, and proprietary information including, but not limited to rights to own, access, license or use that information that is developed, provided or delivered under a government contract is vital to the success of the teaming arrangement and contract performance.

The teaming agreement must address how the teaming partners intend to provide the Government with the ability to acquire or license intellectual property or technical data rights sufficient to meet the prime contract obligations to the Government and the intellectual property requirements of the prime contract. Specifically, the teaming partners should address the ownership, exchange or licensing of intellectual property or technical data by and between themselves and the Government. The teaming agreement also should provide guidance and restrictions related to how the parties will treat and protect intellectual property, technology, software, or trade secrets developed during the proposal (and ultimately during the performance) period. It is not unusal for the prime contractor or larger teaming partner to seek greater rights to the intellectual property or technical data of the subcontractor or smaller teaming partner through teaming agreement negotiations, and therefore, it is common for subcontractors or the smaller teaming partner to seek additional protection for its intellectual property and technical data rights (i.e., the "crown jewels") with an intellectual property clause in the teaming agreement that limits the licensing and ownership rights or access to the subcontractor's intellectual property or data rights to the target project or a clause that restricts broad disclosure or distribution of the intellectual property rights. The FAR and especially the DFARS provide helpful mechanisms that can be used to protect the teaming partners, prime contractors, and subcontractors intellectual property and technical data rights.

For a complete discussion of the intellectual property rights that teaming partners, prime contractors and subcontractor should seek to protect, please visit Steptoe's Supply Chain Toolkit.

Conclusion

The importance of successful team formation to a Government contractor's business success is not disputed, but team formation has not received the attention or focus that it deserves. Team formation too often is approached in a reactive manner during the heat of a competition, and not afforded the due diligence and consideration warranted by a decision that has major competitive impacts and significant legal obligations. Steptoe created this Teaming Agreement Toolkit to provide an understanding and review of the impacts and benefits of team formation, including the risks inherent in the team formation process.

Steptoe is available to work with clients in navigating team formation and implementing team arrangements appropriate for a client's business. For more information, please contact any one of the following Steptoe points of contact for Government contracting team arrangements or teaming agreements: Kendall Enyard, Paul Hurst, Tom Barletta, Peter Wellington, Mike Navarre, Fred Geldon and Caitlin Conroy (or visit Steptoe's Government Contracts Group website).