

# **Making the Team:**

## **Best Practices for Forming Teaming Agreements and Avoiding Disputes**

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# Teaming Agreements

Definition, Considerations,  
Opportunities, Benefits, and  
Limitations

# What Are Teaming Agreements?

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- Teaming Agreements are contracts between parties to team together for a specified period of time for the purpose of bidding on a contract.
- FAR Subpart 9.6 defines Teaming Arrangements as “an arrangement in which –
  - (1) Two or more companies form a partnership or joint venture to act as a potential prime contractor;
  - (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 Considerations

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- Does the teaming partner provide specialized experience or skill?
- Does the teaming partner know the customer?
- Will the teaming partner properly perform?
- Is the teaming partner a small business?
- Will the teaming partner provide a competitive price/cost?
- Will the teaming partner provide proposal support?



# Teaming Agreement – Opportunities

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- Market Entry
- Funding
- Leverage Capabilities
- Past Performance
- Formal teaming agreement reduces risk
  - i.e. eases reluctance to team with unfamiliar company



# Teaming Agreement – Benefits

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- Establish exclusivity
- Pre-negotiate terms before contract award
  - E.g., termination provisions, disputes, choice of law
- Define statement of work or work share
- Tailor to a specific procurement(s)



# Teaming Agreement - Limitations

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- May be unenforceable
- May need to negotiate a new Teaming Agreement for each new opportunity
- May fail to agree on subcontract terms and conditions after contract award
- Teaming with the wrong company could result in loss of award
- Some government customers may prohibit exclusivity



# Teaming Agreement – Limitations Continued

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- Could limit future actions:
  - If agreement is terminated, team member may lose the ability to bid on procurement
  - May limit the ability to perform work in-house (e.g. make or buy decision)
  - May limit the ability to develop capabilities





# Teaming Agreements

## Due Diligence

# Due Diligence

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- Due diligence is a must before entering into any teaming arrangement
- Consider the following:
  - Responsibility, e.g. SAM.Gov, excluded party?
  - Performance, e.g. any terminations for default/cause?
  - Organizational Conflicts of Interest
  - Resources
  - Relationship with customer
  - Penchant for law suits
  - Reputation





# Teaming Agreements

## Key Terms

# Key Terms

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- Non-Solicitation of employees
  - Prohibits the solicitation of the other party's employees
  - Typically contains a time period for the prohibition
  - <https://www.stepto.com/en/news-publications/no-poaching-clauses-in-teaming-agreements-may-face-scrutiny-under-new-doj-ftc-antitrust-guidance.html>
- Exclusivity
  - Prohibits the subcontractor from teaming with another prime contractor for the same procurement



# Key Terms Continued

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- Workshare
  - Provides the scope of work and/or work share percentage for future subcontract
- Termination
  - Explains when and under what circumstances a Teaming Agreement can be terminated



# Key Terms Continued

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- Non-Disclosure
  - May be executed separately
  - Permits the parties to share information but restricts improper use and disclosure to third parties
- Intellectual Property
  - Protects both parties' intellectual property
    - FAR Subpart 27.304-3 prohibits primes from using subcontracts to acquire the rights to a subcontractor's inventions/IP for themselves

# Key Terms Continued

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- Choice of Law
  - Which law state law governs
  - Federal Law (FAR 52.233-4)
- Disputes
  - Defines parameter of disputes
  - Can require negotiation between company executives before other forms of dispute resolution
  - Arbitration vs. court
  - Dispute fees



# Key Terms Continued

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- Limitation of Liability
  - Can limit damages to actual costs of time spent on teaming activities
- Flow Down Clauses and Key Subcontract Terms
  - Identify required flow-down clauses (FAR and Supplemental FAR clauses)
    - Check size and scope thresholds
    - Exceptions for commercial items and small business subcontractors





# Teaming Agreements

## Leverage and Bargaining Power

# Leverage and Bargaining Power - Prime

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- Has leverage by virtue of leading the team
- Likely has the key personnel, specialized experience, and customer relationship
- Likely has past performance
- Will care the bulk of the bid and proposal cost



# Leverage and Bargaining Power - Prime

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- Prime can:
  - Limit scope of work/work share
  - Ensure favorable termination provisions

# Leverage and Bargaining Power - Subcontractor

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- More leverage when:
  - The arrangement results in prime and sub relationship
  - Subcontractor has key personnel
  - Subcontractor has specialized expertise, i.e. fills a void the prime cannot fill
  - Subcontractor has a better reputation
  - Subcontractor assists with proposal preparation



# Leverage and Bargaining Power - Subcontractor

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- Subcontractor can ask for:
  - Clearly defined scope of work
  - Work share percentage
  - Requirement for prime to seek best efforts to obtain consent to subcontract (FAR Subpart 44.2)
  - Prohibit the use of known bad past performance to be basis for termination of the agreement
  - Agreement that other suitable work will be provided if the government descopes subcontractor's SOW work or equivalent work on a different contract



# Teaming Agreements

Choice of Law, Enforceability, and Key Takeaways

# Choice of Law

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- Companies generally choose to make state law apply
- Federal law likely does not apply
  - FAR 52.233-4, Applicable Law for Breach of Contract Claim
  - Parties may be diverse but likely no federal question
    - National security could invoke federal question (*See New SD, Inc. v. Rockwell Int'l Corp.*, 79 F.3d 953 (9th Cir. 1996))
- Consider whether the law selected will uphold the enforceability of the agreement

# Teaming Agreement Enforceability – Virginia

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- Teaming Agreements that are conditioned on future events and negotiations **without** guarantees regarding price, scope of work, etc. is unenforceable
  - See *CGI Federal v. Fci Federal*, 295 Va. 506 (2018); *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 939 F. Supp.2d 572 (E.D. Va. 2013); *W.J. Schafer Assoc. v. Cordant*, 493 S.E.2d 512, 513 (Va. 1997)
- However, teaming agreements that require a resulting subcontract award and clearly define the subcontractor's role and the work to be performed are enforceable
  - See *EG&G Tech. Serv. Inc. v. Cube Corp.*, Ch. No. 178996 (Fairfax County Cir. Ct. Dec. 23, 2002) (*specific performance granted*)





# Teaming Agreement Enforceability – D.C.

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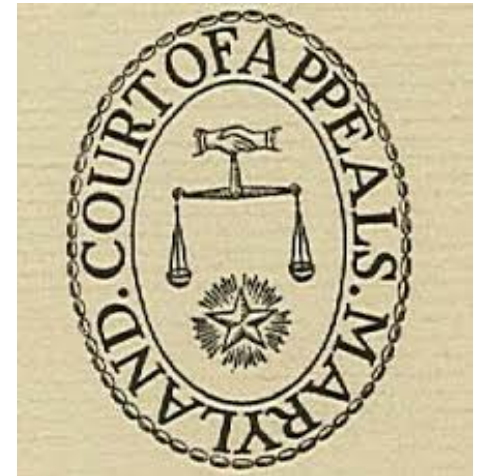
- Teaming Agreements are enforceable if:
  - (1) there was an intent to be bound
  - (2) material and essential terms are sufficiently definite
- May be enforceable if obligation is specific even if details on how to meet the obligation are not
  - *Demissie v. Starbucks Corp. Office and Headquarters*, 668 Fed.Appx. 13 (D.C. Cir. 2017)
- Key is to be able to tell from the agreement whether (1) a breach occurred; and (2) what the remedy would be



# Teaming Agreement Enforceability – Maryland

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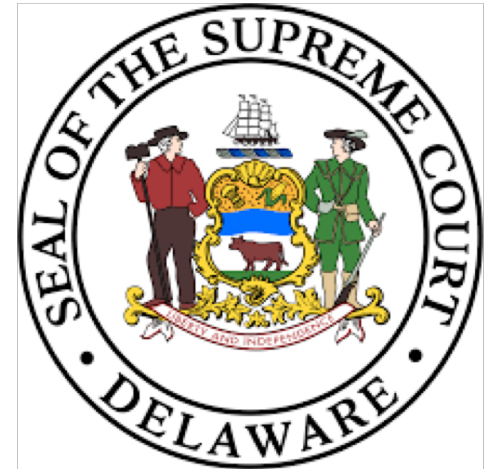
- Teaming Agreements are enforceable if they provide definite terms and specific obligations
- Agreement to negotiate in good faith likely enforceable over an agreement to a framework to negotiate a future subcontract
  - *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md.App. 164, 177-83 (2015)
- Workshare agreements may be enforceable if no material terms are left for future negotiation



# Teaming Agreement Enforceability – Delaware

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- Enforceable if: (1) the parties intended to be bound; and (2) contains definite material or essential terms



# Teaming Agreement Enforceability – Takeaways

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- Teaming Agreements that contain all essential terms might be legally cognizable as subcontracts.
- But, generally, Teaming Agreements are unenforceable regarding “guaranteeing” a subcontract, expected prices, workshare, etc.
- TAs are generally enforceable as agreements-to-agree, requiring the parties to negotiate a future subcontract “in good faith,” unless the TA lacks specificity.

# Teaming Agreement Enforceability – Takeaways

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- Cases are fact intensive and parties' actions can create an enforceable agreement
  - *i.e.* do the parties hold themselves out as teammates? Were there oral conversations that established a teaming agreement?
- Damages could include specific performance or large recoveries (especially if there is bad faith)
  - Limitation of Liability Clause can cap recovery
- Choice of law and choice of forum does not have to be the same state



# Teaming Agreements

## Commonly Litigated Issues

# Enforcement of Workshare Percentages

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- The enforcement of workshare percentages is a commonly litigated issue because workshare terms are often ill-defined.
- Workshare can be percentage of dollars or work.
- If percentage of dollars, is the percentage based on the amount awarded or the amount bid? Is the percentage of the amount awarded or bid taken after the prime's share?
- If percentage of work, is the percentage based on the entire statement of work, a specific piece of the statement of work, FTE, etc.?
- Is there a time frame to reach the workshare percentage, i.e. does the percentage have to be met in the base period or over the life of the contract?



# Teaming Agreements

## Other Preliminary Agreements



# Letters of Intent

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- An agreement to explore whether a teaming arrangement is possible
- Can result in a teaming agreement or can be used in lieu of a teaming agreement, if the team member is not providing past performance or proposal support
- Can include a statement of terms to be negotiated or a schedule of milestones to reach a definitive agreement
- May contain exclusivity language
- Less formal than other preliminary agreements



# Memorandum of Understanding (MOU)

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- More formal than a letter of intent
- Describes the opportunity/procurement and outlines the parties' **understanding** of the relationship for the opportunity
- May limit the team members' ability to team with other companies
- May contain basic terms and conditions, e.g. Disputes clause
- Could become the basis for a cause of action

# Memorandum of Agreement (MOA)

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- Similar to the MOU except it outlines the parties' agreement of key terms
- May limit the team members' ability to team with other companies
- May contain basic terms and conditions, e.g. Disputes clause
- Could become the basis for a cause of action

## Other Preliminary Agreements Takeaways

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- Preliminary Agreements are means to facilitate negotiation and assistance with the proposal process
- Requirement to enter into a future contract may or may not be enforceable
- Can create a cause of action and result in the assessment of substantial damages
  - \$11 billion Pennzoil recovery based on interference with preliminary agreement (recovery later reduced)



# Teaming Agreements

## Subcontracts

# Subcontracts - Definition

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- An enforceable contract between a prime contractor and a subcontractor or a subcontractor and a lower-tier subcontract, if lower-tier subcontracting is permissible
- Typically executed or becomes effective after prime contract award
- No privity of contract between subcontractor and the government



# Subcontracts- Prime's Responsibility

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- Prime contractor is responsible for:
  - Overall contract performance and managing subcontractor's performance;
  - Flowing down required FAR clauses and ensuring compliance with clauses; and
  - Payment

# Subcontracts- Subcontractor's Responsibility

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- Subcontractor is responsible for:
  - Performing properly and timely
  - Submitting timely invoices
  - Notifying prime of performance issues
  - Managing lower-tier subcontractors, if applicable





# Subcontracts – Key Contract Provisions

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- Subcontract should include the following key contract provisions:
  - Mandatory FAR flow-down clauses
  - The FAR Changes clause incorporated in the prime's contract or a tailored changes clause
  - A Termination for Convenience clause
  - An Intellectual Property clause
    - *See* FAR 27.304-3
  - A clearly defined statement of work
  - A disputes clause (including one that Choice of law, choice of forum, and addresses pass-through claims)
  - Invoicing instructions

# Questions?

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