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GovCon 101: Teaming Agreements

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April 29, 2024

Nice to Meet You!



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Ten Questions About Teaming Agreements

1. What are my business objectives? What do I want to accomplish with this teaming agreement?
2. What are our roles and responsibilities?
3. How do my priorities differ if I'm the prime or the sub?
4. What rights does the Government have in my teaming agreement?
5. What's the difference between a regular teaming agreement and a CTA?

Ten Questions About Teaming Agreements (cont'd)

6. Does choice of law matter?

7. How careful do I need to be about keeping my data confidential?

8. Are there specific risks when teaming with small businesses?

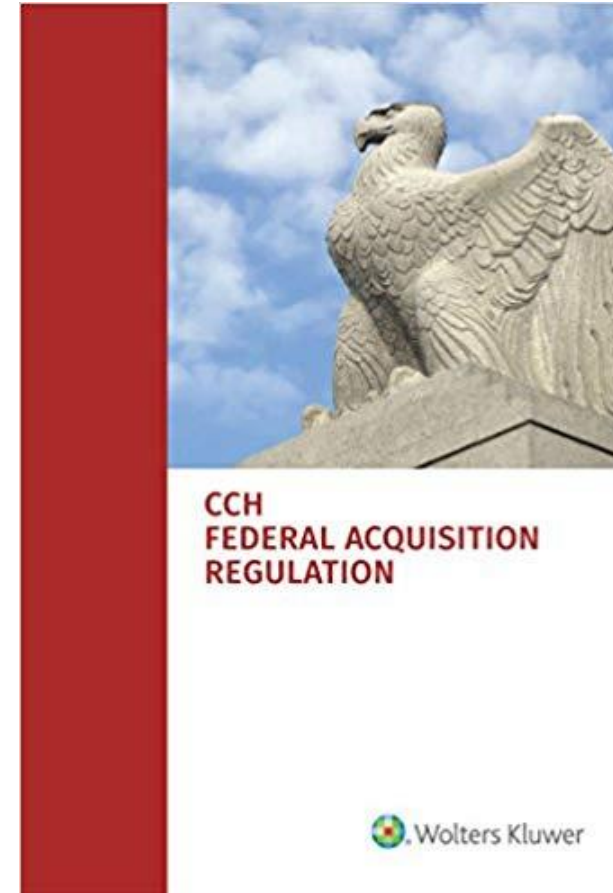
9. Should my teaming agreements be exclusive or non-exclusive?

10. What should I do if things go bad?

- 1. What are my business objectives?
What do I want to accomplish with this
teaming agreement?**

1. Business Objectives

- FAR 9.602(b):
Contractor team arrangements may be desirable from both a Government and industry standpoint in order to enable the companies involved to (1) complement each other's unique capabilities and (2) offer the Government the best combination of performance, cost, and delivery for the system or product being acquired.



1. Business Objectives (cont'd)

- Customize your teaming agreement
 - Each teaming arrangement is unique
 - No standard federal form “TA1”
 - Not even for GSA CTAs
 - Work from a template

Never sign a “standard” teaming agreement!

2. What are our roles and responsibilities?

2. Roles & Responsibilities

- What role is each party playing?
 - Prime/Sub?
 - Joint Venture?
 - CTA?
 - Interactions with the customer/negotiations?



2. Roles & Responsibilities (cont'd)

- What is each party promising to do?
 - Proposal development
 - Future work



3. How do my priorities differ if I'm the Prime or the Sub?

3. Prime vs. Sub

- Prime Contractor's Perspective
 - Keeping control
 - "Customer Service"
 - "Keeping my options open..."
 - Profitability



3. Prime vs. Sub (cont'd)

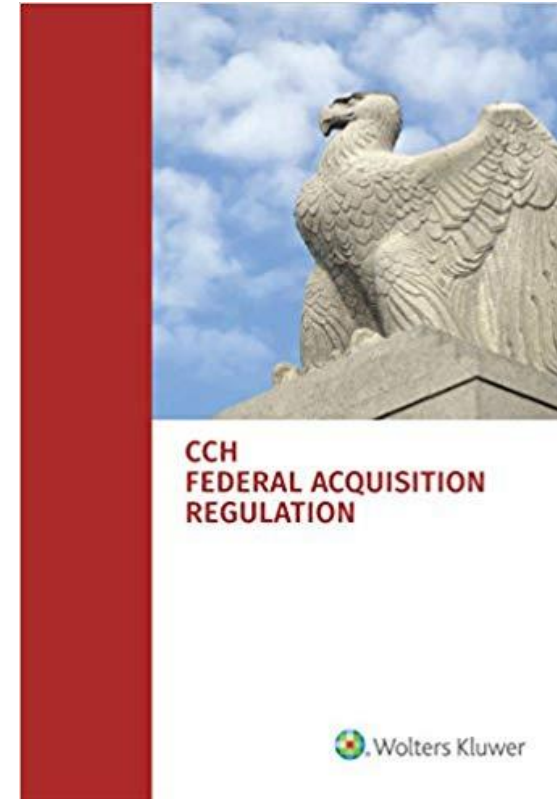
- Subcontractor's Perspective
 - “Now, not later...”
 - Specific, specific, specific
 - Face time with the customer
 - “Me, and only me”



4. What rights does the Government have in my teaming agreement?

4. Government Rights

- Per FAR 9.604:
 - Antitrust
 - Consent to Subcontracts (FAR Subpart 44.2)
 - FAR 52.244-2
 - Responsibility Determinations
 - Data Rights
 - Competition in Contracting
 - FAR 52.244-5 (Subcontracting)
 - Performance Guarantees



5. What's the difference between a regular teaming agreement and a CTA?

5. Regular TA vs. CTAs

- Contractor Team Arrangements (CTAs)
 - Unique to the GSA Schedule program
 - Every member of a CTA must hold a Schedule Contract
 - Subcontractors are members of the team, but not members of the CTA
 - Every member must qualify for set-asides
 - Each member required to comply with its GSA Schedule contract + terms of orders issued to CTA



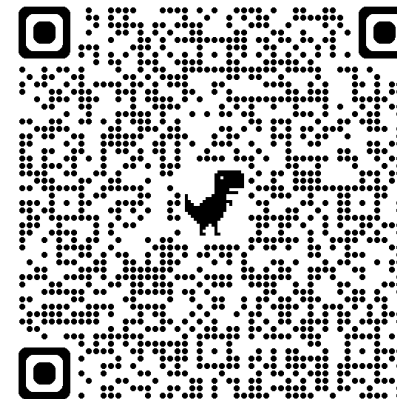
Multiple award schedule

Team up with other MAS contractors

Two or more Multiple Award Schedule contractors can team up to be able to compete for orders that they may not qualify for on their own. These are called contractor team arrangements.

i FAR Subpart 9.6 does not apply here

A MAS CTA does not create a separate legal entity.



5. Regular TA vs. CTAs (cont'd)

Contractor Team Arrangement (CTA)	Prime Contractor / Subcontractor Arrangement
Each team member must have a GSA Schedule contract.	Only the prime contractor must have a GSA Schedule contract.
Each team member is responsible for duties addressed in the CTA document.	The prime contractor cannot delegate responsibility for performance to subcontractors.
Each team member has privity of contract with the government and can interact directly with the government.	Only the prime contractor has privity of contract with the government and can interact with the government. The prime contractor is responsible for its subcontracting activities. Buying agencies are encouraged to specify in the Request for Quotation (RFQ) that the CO must approve using subcontractors before they can perform.
The buying entity is invoiced at each team member's unit prices or hourly rates as agreed in the task or delivery order or GSA Schedule BPA.	The buying agency is invoiced according to the prime contractor's GSA Schedule contract, including any applicable price reductions.
Total solutions, otherwise impossible under individual GSA Schedule contracts, can be put together quickly and easily.	The prime contractor is limited to the supplies and/or services awarded on its GSA Schedule contract.

5. Regular TA vs. CTAs (cont'd)

- Key Features of a CTA
 - Identify team members
 - Identify team leads
 - May include responsibility for invoicing/ payments
 - MAS contract numbers
 - Description of tasks to be performed
 - Pricing
 - Each vendor can use its own pricing



6. Does choice of law matter?

6. Choice of Law

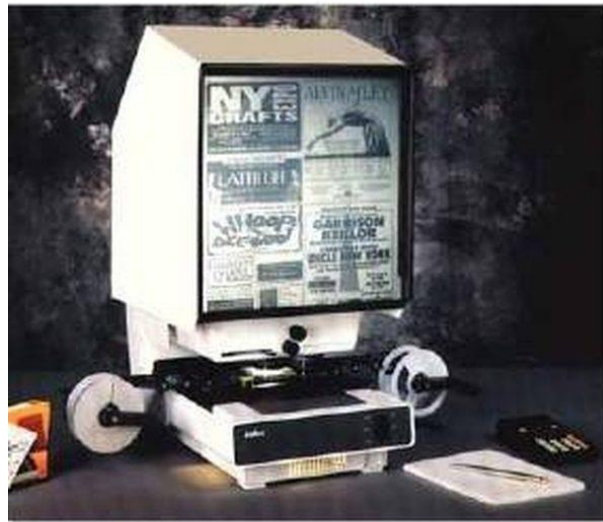
- Virginia law is illustrative



**“Agreement to agree”
vs.
Duty to award subcontract**

6. Choice of Law (cont'd)

- *W.J. Schafer Associates, Inc. v. Cordant, Inc.*, 254 Va. 541, 493 S.E.2d 512 (1997)
 - Teaming agreement is an unenforceable agreement to negotiate in good faith
 - The essential terms were too “vague and indefinite” to be enforced



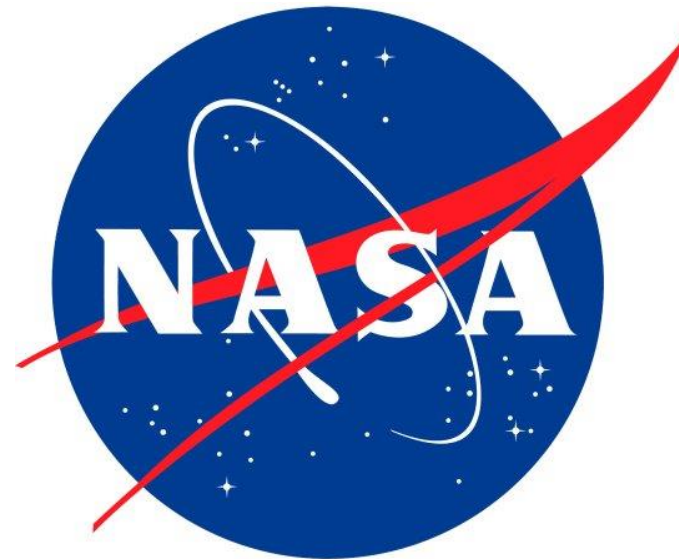
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6. Choice of Law (cont'd)

- The agreement did not specify the subcontract **price**
- Schafer was not contractually **obligated** to deliver the hardware
- Cordant reserved the right, in its discretion, “to pursue a replacement product”
- No **remedy** for breach
- No method of determining **damages**

6. Choice of Law (cont'd)

- *EG&G Inc. v. The Cube Corp.*, Chancery No. 178996, 2002 WL 31950215 (Va. Cir. Ct. Dec. 23, 2002)
 - Agreement imposed an absolute duty to award a subcontract



6. Choice of Law (cont'd)

- Exclusive, written teaming agreement
- Mandatory language (“will/shall”; “if/then”)
- Firm workshare allocation
- Future subcontract terms were pre-negotiated by the parties

“The Court finds that Cube’s attempt to alter the terms, under which the parties have been successfully working, was made in bad faith in order to be able to terminate EG&G in order to reduce Cube’s costs, while at the same time increase the amount of fee that Cube could collect under the [contract].”

6. Choice of Law (cont'd)

- *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 939 F. Supp. 2d 572 (E.D. Va. 2013)
 - Applying Virginia law, and following *Schafer*, the court declined to extend *EG&G*
 - Unenforceable agreement to agree



6. Choice of Law (cont'd)

- Some mandatory terms...
 - Specific workshare allocation
 - “If/then”
- But...
 - Subcontract was **subject to negotiation** and future execution
 - Termination clause provided that the agreement was subject to termination upon **failure of the parties to reach agreement** on the subcontract
 - Subcontract was **subject to the Government’s approval**
 - **Allocation of work** in future subcontract was subject to change, as additional workshare information became available
 - **Integration clause** (agreement interpreted as a whole)

6. Choice of Law (cont'd)

- ✓ Exclusivity?
- ✓ Obligations of the parties
 - Pre-negotiated subcontract?
- ✓ Nature of work
- ✓ Scope of work
- ✓ Place of performance
- ✓ Contract schedule
- ✓ Duration/period of performance
- ✓ Mandatory language? (“will/shall”)
- ✓ Remedies
- ✓ Price/compensation/valuation of agreement

Or, perhaps, you do not want to define your requirements so specifically in order to allow yourself maximum flexibility.

7. How careful do I need to be about keeping my data confidential?

7. Data Confidentiality

- Non-Disclosure Agreements
 - Early; often
 - Limit distribution of data
- Label materials as “proprietary”
 - Consider protections for information shared orally



8. Are there specific risks when teaming with small businesses?

8. Small Businesses

- Teaming Agreements are ideal for building relationships with small businesses
 - Small business subcontracting plans
 - Small business set-asides



U.S. Small Business
Administration

8. Small Businesses (cont'd)

- Beware of **affiliation** risks (13 C.F.R. § 121.103)
 - Affiliated companies are aggregated for purposes of size determination
 - 250 employees + 30,000 = large business; **not** small
 - Key issue is “control”
- Beware of **ostensible subcontractor** rule
 - Large business subcontractor actually does the “primary and vital” portions of the work
- Beware of **limitations on subcontracting** (for small business set-asides)
 - FAR 52.219-14 (at least 50%)

9. Should my teaming agreements be exclusive or non-exclusive?

9. Exclusive vs. Non-Exclusive

- Exclusivity could create antitrust issues
 - NRO Acquisition Manual
 - Withdrawn DFARS rule (2002)
- How?
 - Horizontal integration
 - Vertical integration



10. What should I do if things go bad?

10. Terminations/Disputes

- Plan ahead
 - Treat it like a pre-nuptial agreement
 - Get it in writing!
- No-fault terminations
 - Build in convenient “off-ramps”
- Limitations on liability
- Disputes clause can allow for private resolution
 - Escalation
 - Arbitration



Quiz/Recap

Quiz/Recap

1. Which of the following is NOT listed at FAR Subpart 9.6 as a reason that the Government will recognize a contractor teaming arrangement?
 - a. The companies complement each other's unique capabilities
 - b. The companies offer the best combination of performance, cost, and delivery
 - c. The companies are encouraging small business participation
 - d. None of the above – they are all listed!

ANSWER: C, Small business participation. While, as a practical matter, teaming arrangements can be ideal to build small business relationships and allow small businesses to participate in the bidding process, small business participation is not mentioned at FAR 9.602 or 9.603.

Quiz/Recap

2. Which of the following are listed at FAR Subpart 9.6 as Government limitations on a teaming agreement?
- a. Antitrust concerns
 - b. Government approval/consent to subcontract
 - c. Competition in subcontracting
 - d. Responsibility determinations
 - e. All of the above

ANSWER: E, All of the above. FAR 9.604 specifically notes that the Government reserves the right to address these issues (and others), notwithstanding the terms of a specific teaming agreement.

Quiz/Recap (cont'd)

3. True or False: Signing a Teaming Agreement guarantees a company future business if the team is eventually awarded a contract by the Government.
 - a. True
 - b. False
 - c. “I don’t understand the question...”

ANSWER: B, False. A teaming agreement is not usually a guarantee that a company will receive future work. On rare occasions, the terms of a specific teaming agreement might be sufficiently precise to reflect an unconditional promise to award a subcontract. But more typically, a teaming agreement will be considered an “agreement to agree” – a promise to work together *now*, with the expectation that the future workshare and subcontract will be separately negotiated in the *future*.

Quiz/Recap

4. What is one of the key differences between a standard teaming agreement and a CTA?
 - a. Use of a different federal form
 - b. How the parties are paid
 - c. All team members must hold a GSA Schedule Contract
 - d. None of the above

ANSWER: C, GSA Schedule Contract. All parties to a CTA must hold their own GSA Schedule Contract, allowing the team members to function as “co-primes,” not necessarily prime contractors and subcontractors, even though one of the team members is normally designated as the “Team Leader.” Additionally, the GSA is explicit that FAR Subpart 9.6 does not apply to CTAs.

Quiz/Recap

5. True or False: Federal law and prime contract requirements prohibit a prospective subcontractor teaming partner from altering the terms of a proposed teaming agreement.
- a. True
 - b. False
 - c. “I just sign what they give to me...”

ANSWER: B, False. There is no standard form for a teaming agreement, although many companies work off of their own standard templates. But every teaming agreement is subject to mutual agreement (and negotiation). If you have the leverage to gain more advantageous terms for your company, you can try to do it (subject, of course, to the Government limitations set forth in FAR 9.604).

Questions?



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