

Subcontract Management From A to Z:

Session 2: Joint Ventures and Teaming Agreements

February 20, 2024

David S. Gallacher, Kutak Rock LLP

David.Gallacher@KutakRock.com

(202) 828-2437

Introduction



David Gallacher

+1 202.828.2437 | Washington, D.C.

David.Gallacher@KutakRock.com

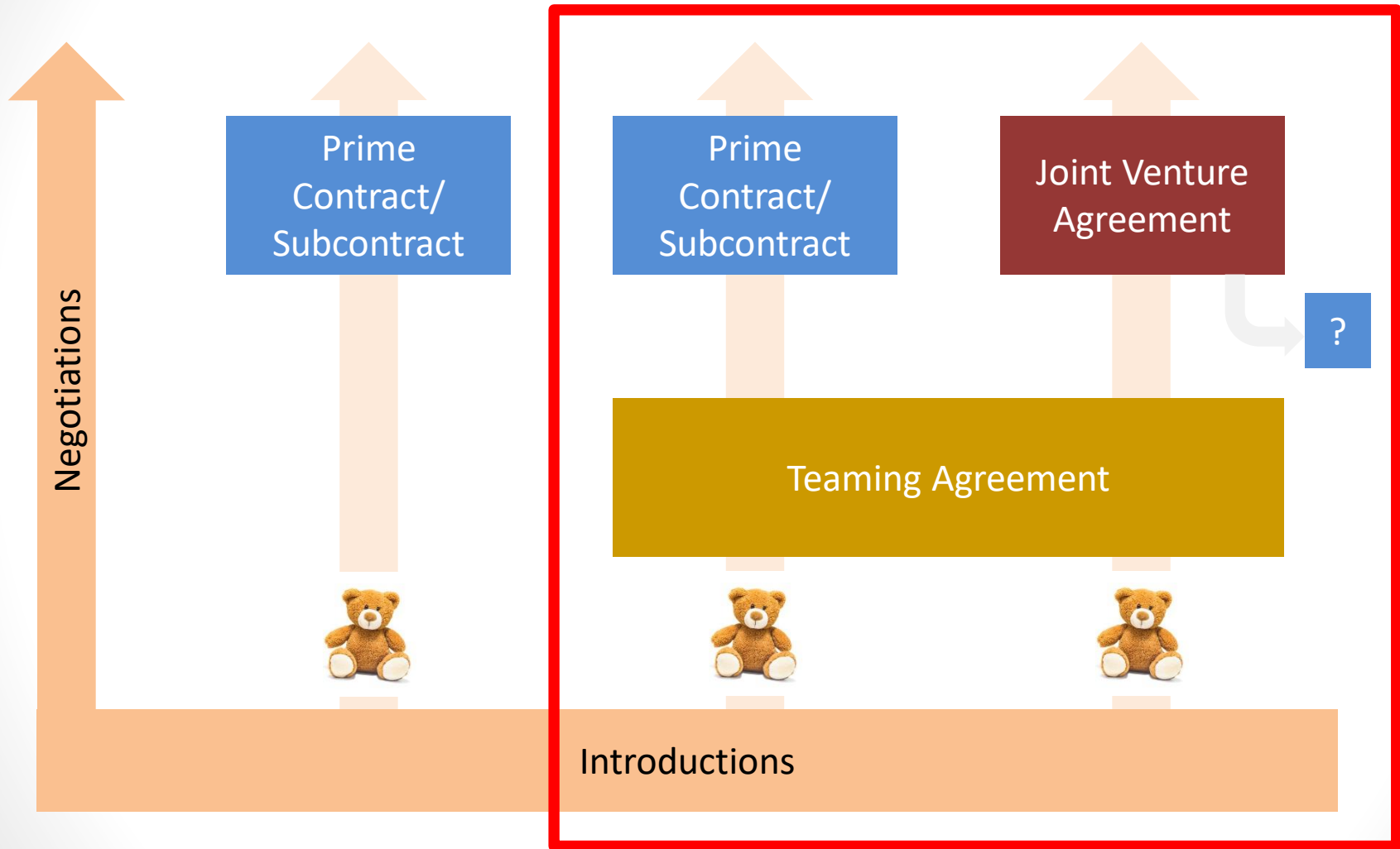
Overview of the Series

- January 16: Federal Subcontracting 101 (An Overview)
- February 20: Joint Ventures and Teaming Agreements
- March 19: Small Business Programs
- April 16: Small Business Subcontracting
- May 21: Contractor Purchasing Systems
- June 18: Selecting Subcontracts
- September 17: Subcontract Negotiations and Flowdowns
- October 15: Subcontract Pricing
- November 19: Subcontract Management and Administration

The Story of the Three Bears



The Story of Three Business Models...



Today's Agenda

- Teaming Arrangements Under FAR Subpart 9.6
- Teaming Agreements
- Joint Ventures



1. Teaming Arrangements Under FAR Subpart 9.6

Teaming Arrangements (FAR Subpart 9.6)

- Contractor **team arrangement**:
 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 Arrangements (cont'd)

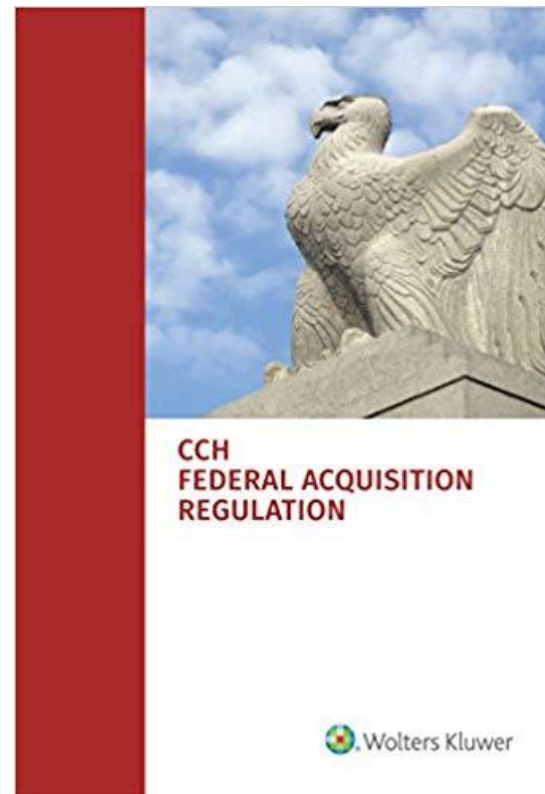
- FAR 9.602(a):

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.



Teaming Arrangements (cont'd)

- Per FAR 9.604, the Government reserves the right to challenge teaming arrangements based on:
 - ✓ Antitrust
 - ✓ Consent to Subcontracts (FAR Subpart 44.2 + FAR 52.244-2)
 - ✓ Responsibility Determinations
 - ✓ Data Rights
 - ✓ Competition in Subcontracting (FAR 52.244-5)
 - ✓ Performance Concerns/Guarantees



2. Teaming Agreements

- Enforceability & Best Practices
- CTAs
- Protecting IP
- Exclusivity
- Terminations/Disputes
- Small Business Issues

Teaming Agreements: Prime v. Sub



Prime

- Keeping control
- “Customer Service”
- “Keeping my options open...”
- Profitability



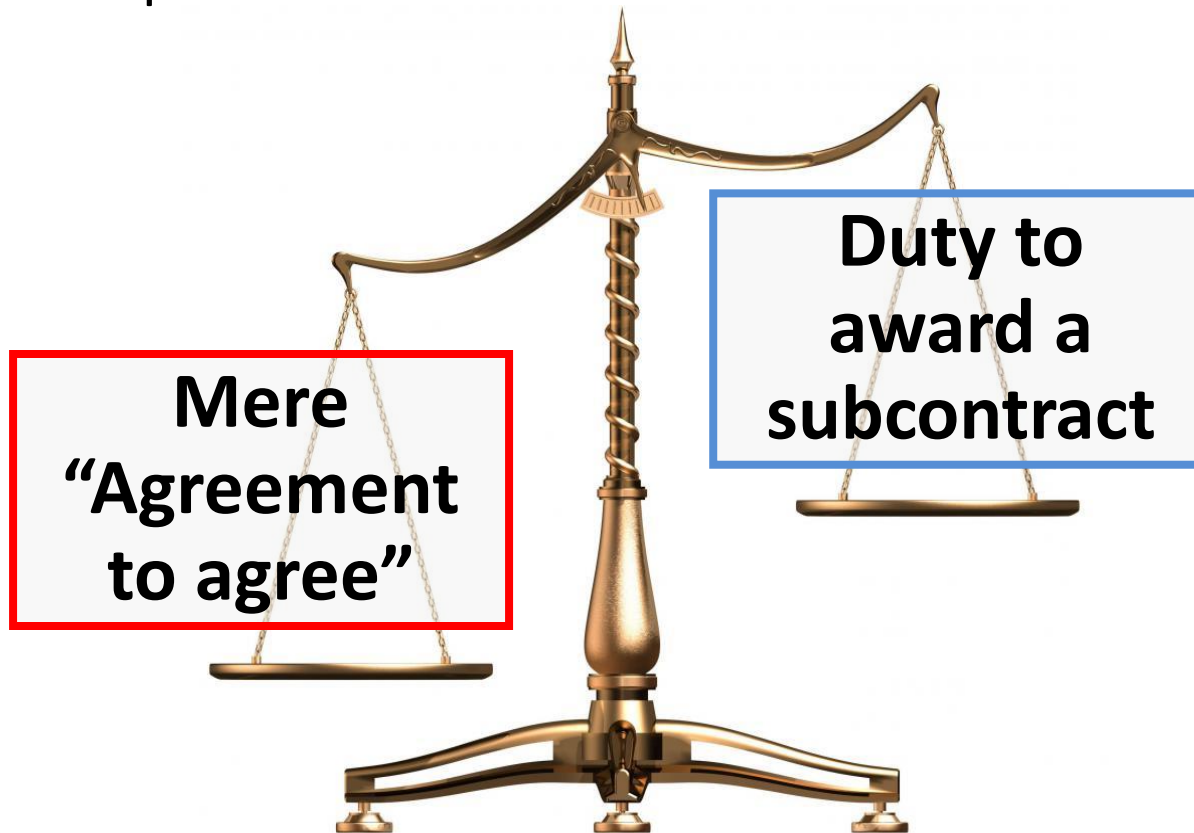
Sub

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



Are Teaming Agreements Enforceable?

- There are generally two ways that teaming agreements are interpreted:



Teaming Agreements: Enforceability (cont'd)

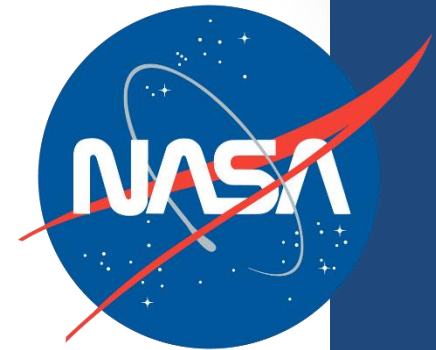
*W.J. Schafer
Associates, Inc. v.
Cordant, Inc.,
254 Va. 541, 493
S.E.2d 512
(1997)*

Teaming agreement is an unenforceable agreement to negotiate in good faith

- The essential terms were too “vague and indefinite” to be enforced
- The agreement did not specify the subcontract **price**
- Sub was not contractually **obligated** to deliver the hardware
- Prime reserved the right, in its discretion, “to pursue a replacement product”
- No **remedy** for breach
- No method of determining **damages**



Teaming Agreements: Enforceability (cont'd)



*EG&G Inc. v. The
Cube Corp.,
Chancery No.
178996, 2002 WL
31950215 (Va. Cir.
Ct. Dec. 23, 2002)*

Teaming agreement imposed an absolute duty to award a subcontract

- Exclusive, written teaming agreement
- Mandatory language (“will/shall”; “if/then”)
- Firm/defined workshare allocation
- Future subcontract terms were pre-negotiated by the parties
- “The Court finds that [Prime’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 [subcontractor] in order to reduce [Prime’s] costs, while at the same time increase the amount of fee that [Prime] could collect under the [contract].”

Teaming Agreements: Enforceability (cont'd)

*Cyberlock
Consulting, Inc. v.
Information
Experts, Inc.*, 939
F. Supp. 2d 572
(E.D. Va. 2013)



Unenforceable "agreement to agree"

- Applying Virginia law, and following *Schafer*, the court declined to extend *EG&G*
- Some mandatory terms in the teaming agreement...
 - Specific workshare allocation
 - "If/then" language
- 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)

Teaming Agreements: Enforceability (cont'd)

*Navar, Inc. v.
Federal Business
Council,*
291 Va. 338, 784
S.E.2d 296 (2016)

Virginia Supreme Court endorsed the *Cyberlock* analysis

- Affirmed the *Schafer* principles that a non-specific teaming agreement is an unenforceable “agreement to agree”

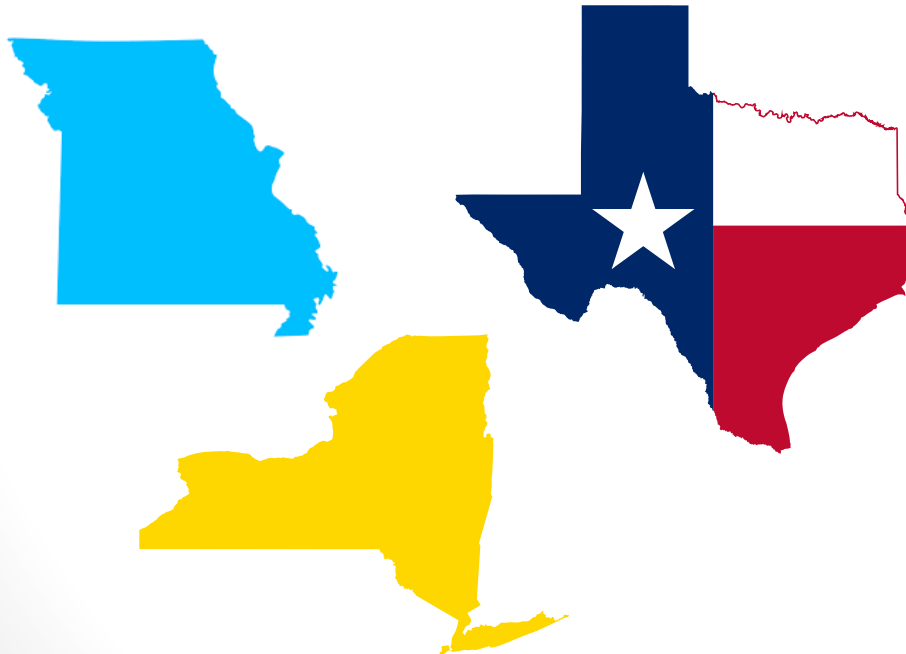
*CGI Federal, Inc.
v. FCI Federal,
Inc.,*
814 S.E.2d 183
(Va. 2018)

Limiting alternate tort remedies



Teaming Agreements: Enforceability (cont'd)

- Other Jurisdictions?
 - Maryland law is (mostly) similar to Virginia
 - Missouri, New York, and Texas may be more favorable for subcontractors
 - California is a mixed bag



Teaming Agreements: Best Practices?

- ✓ 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
- ✓ Choice of Law

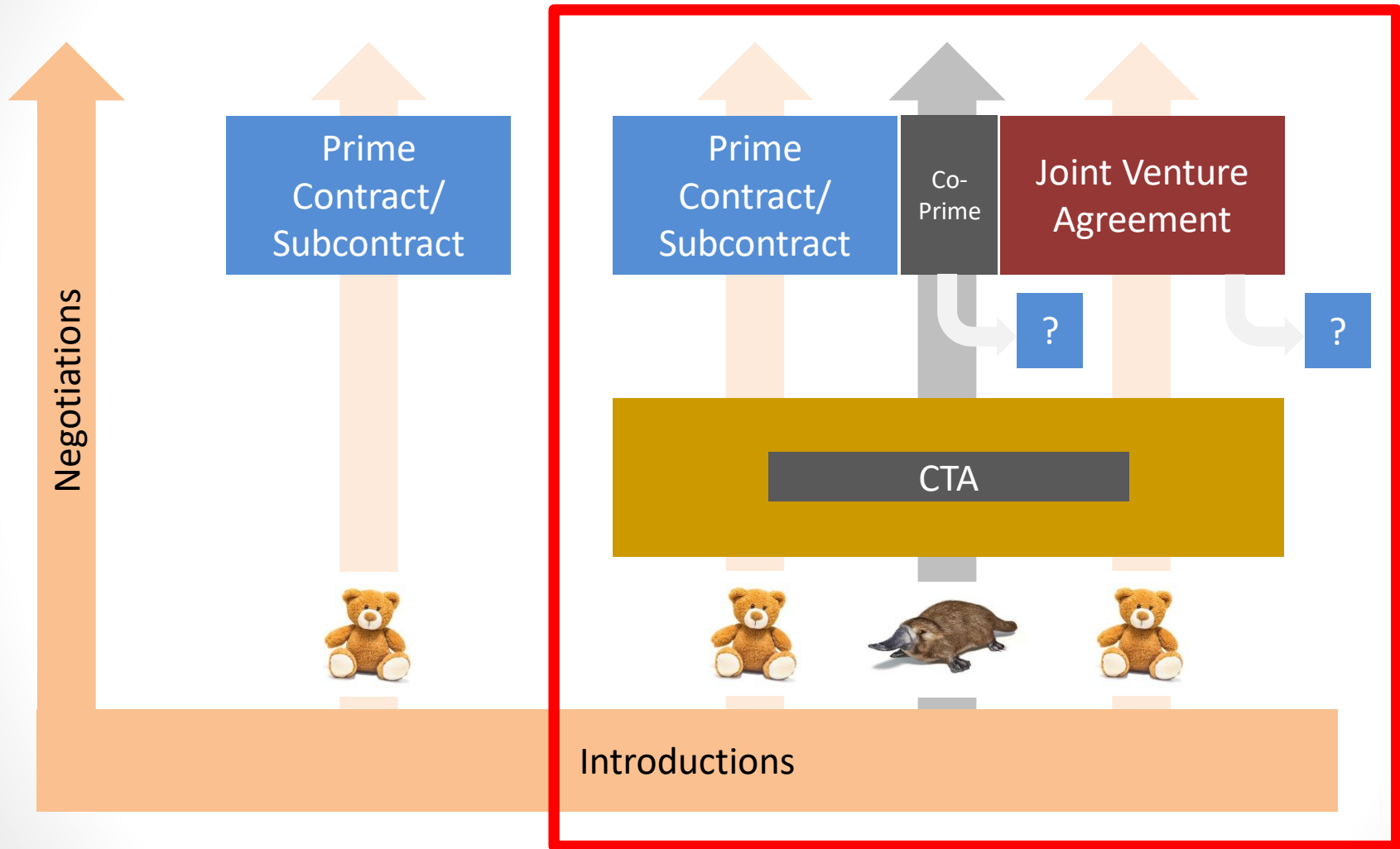
**Or, perhaps,
you do not want
to define your
requirements so
specifically in
order to allow
yourself
maximum
flexibility.**

Teaming Agreements: Best Practices

- Customize your teaming agreement
 - Each teaming arrangement is unique
 - No standard federal form “TA1”
 - Work from a template

**Never sign a “standard”
teaming agreement!**

Four The Story of ~~Three~~ Business Models...



Contractor Team Arrangements (CTAs)



- CTAs are unique to GSA Schedules program
 - Not covered by the FAR Subpart 9.6 rules and the specifics of the arrangement are subject to the discretion of the ordering agency, as set forth in the solicitation
- 2+ GSA Schedule contractors team to propose products/services off multiple schedules
 - CTA members are co-prime contractors, even though one CTA members acts as the “lead”
 - Subcontractors are members of the team, but **not** members of the CTA
 - Subcontractors must use the prime contractor’s GSA Schedule pricing
- Combined solution allows contractors to compete for orders they could not bid on individually
- Every member must independently qualify for set-asides
- Does **not** create a new legal entity/JV
- Each member is required to comply with its GSA Schedule contract + terms of orders issued to the CTA

Contractor Team Arrangements (cont'd)

Contractor Team Arrangement (CTA)

Each team member must have a GSA Schedule contract.

Each team member is responsible for duties addressed in the CTA document.

Each team member has privity of contract with the government and can interact directly with the government.

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.

Total solutions, otherwise impossible under individual GSA Schedule contracts, can be put together quickly and easily.

Prime Contractor / Subcontractor Arrangement

Only the prime contractor must have a GSA Schedule contract.

The prime contractor cannot delegate responsibility for performance to subcontractors.

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 agency is invoiced according to the prime contractor's GSA Schedule contract, including any applicable price reductions.

The prime contractor is limited to the supplies and/or services awarded on its GSA Schedule contract.

Contractor Team Arrangements (cont'd)

Key CTA Steps:



Identify team members



Identify project leads

- May include responsibility for invoicing/payments
- **GSA advises against having the lead invoice for the entire team** – See for example, *AB Staffing Solutions v. ASEFI Capital*, No. 3:22-cv-32 (E.D.Va. Oct. 31, 2022).



Identify MAS contract numbers



Describe tasks to be performed (SOW) – with specificity!



Pricing

- Each vendor can use its own pricing

Teaming Agreements: Protecting IP



Non-Disclosure Agreements

- Early; often
- Limit distribution of data

Proprietary

Label materials as “proprietary”

- Consider protections for information shared orally



Rights in jointly developed IP?



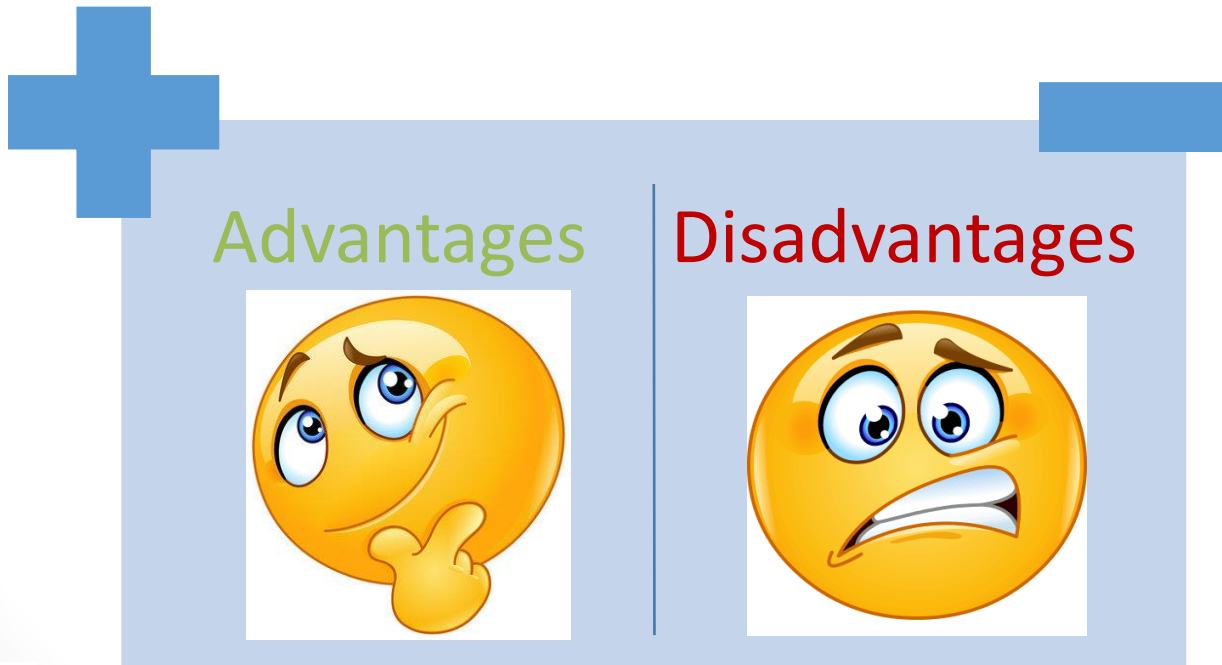
Are extra precautions needed?

- Non-exclusive teaming arrangements?
- Internal firewalls?

Teaming Agreements: Exclusivity



- Exclusivity could create antitrust issues
- How?
 - Horizontal integration (teaming with competitors)
 - Vertical integration (teaming with suppliers)



Teaming Agreements: 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



Teaming Agreements: Small Businesses

- Teaming Agreements are ideal for building relationships with small businesses
 - Small business subcontracting plans
 - Small business set-asides
- We will be speaking more on this topic in March and April
 - ✓ Affiliation
 - ✓ Limitations on subcontracting
 - ✓ Ostensible subcontractor rule



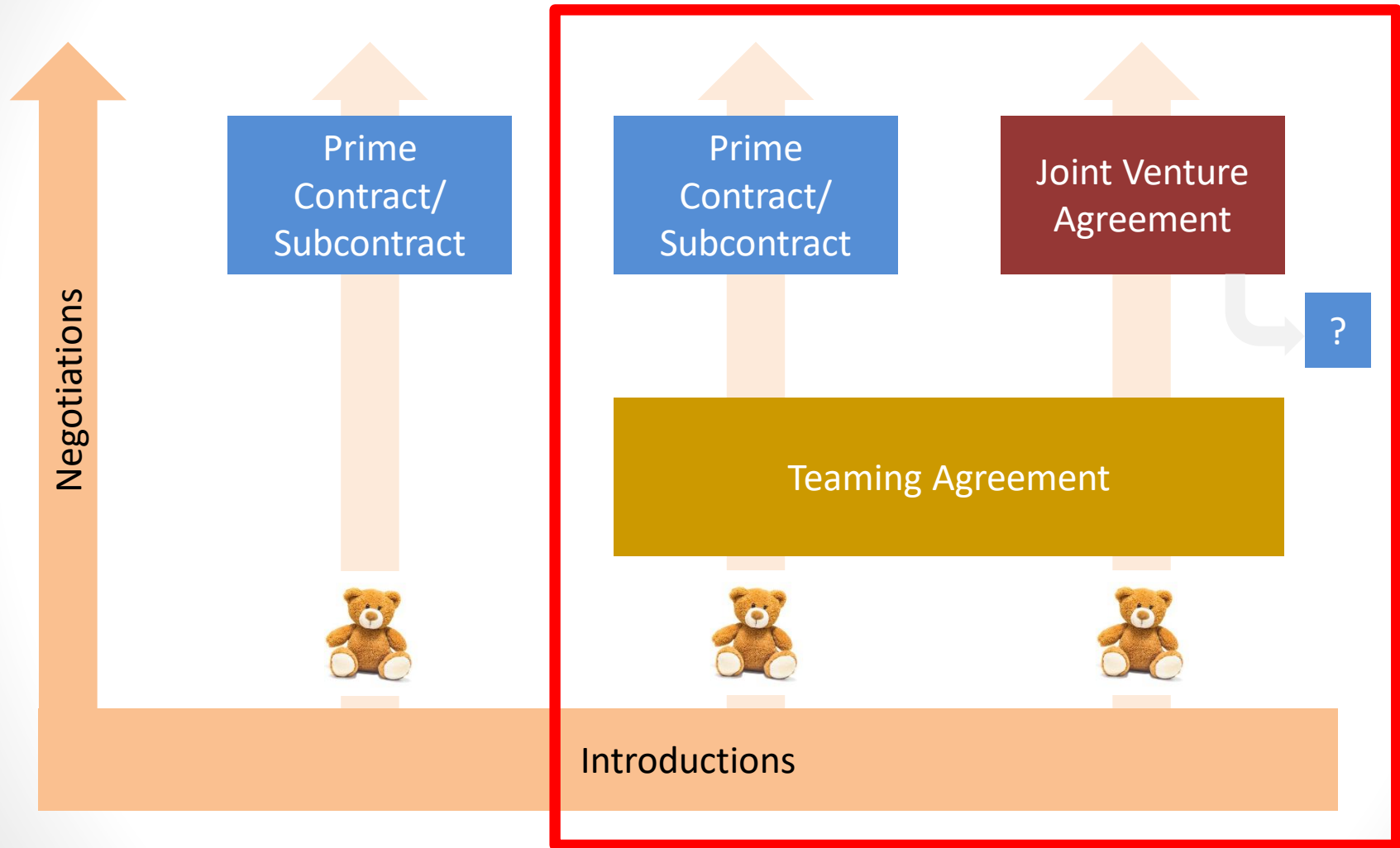
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3. Joint Ventures

- Pros & Cons
- Formation Issues
- Past Performance
- Security Clearances
- Cost Accounting Issues
- Small Business Issues

JVs – The Third Business Model...



Joint Ventures: Pros & Cons

Pros

- ✓ Potential for limited liability isolated to the new JV entity
- ✓ Potential to share past performance
- ✓ Small business opportunities
- ✓ Shared ownership
- ✓ Shared losses/cost overruns

Cons

- x Additional costs
- x Timing
- x Shared management/control
- x Shared liability with JV partners
- x Shared right to payments (general proposition: payment to one JV party normally constitutes payment to all)
- x Shared profits
- x Facility clearance issues

Joint Ventures: Formation

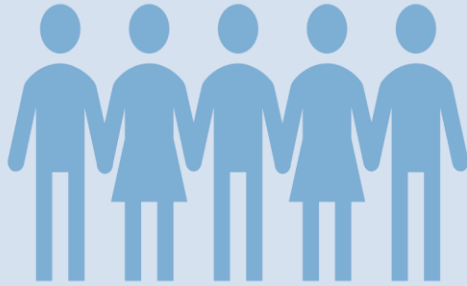
- A Joint Venture is typically a separate entity and generally must have its own [System for Award Management \(SAM\)](#) registration
 - Process of formation/registration may take [months](#)
 - Informal/de facto JVs are risky
- Business Type for JV
 - Partnerships
 - Income and expense flow through to the partners
 - Liability not limited
 - Corporations
 - Limited Liability (particularly useful where Government demands performance guarantees)
 - Limited Liability Companies (LLCs)
 - Best of both worlds
 - Costs of “organization” or “reorganization” of corporate structure unallowable pursuant to FAR 31.205-27.



Joint Ventures: Formation (cont'd)

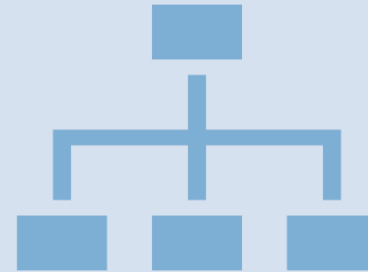
- The JV Agreement should address:
 - Terms of Formation
 - Joint ownership issues
 - Joint contributions
 - Name of the entity
 - Place of business
 - Management structure
 - Personnel
 - Responsibilities for key activities
 - Scope of business opportunities to be pursued through the joint venture
 - Banking
 - Invoicing/payments
 - Insurance
 - Notice requirements
 - Decision-making
 - Unanimity?
 - Veto power?
 - Responsibilities upon withdrawal/dissolution
 - Disputes
 - Who makes the certifications?

Joint Ventures: Populated vs. Unpopulated



Populated

- Has its own employees



Unpopulated

- No or few employees (shell organization)
- Work subcontracted to JV partners

Joint Ventures: Incorporated vs. Unincorporated



Incorporated

- Separate legal entity with stock/membership interest
- Acts as prime contractor
- Common with large construction contracts



Unincorporated

- Partnership or teaming arrangement between 2+ contractors
- Common in small business Mentor/Protégé contracts
- Usually unpopulated
- JV has little to no assets, no separate facilities, no separate financial statements, and little or no G&A, B&P, or material handling expenses

Joint Ventures: Past Performance

- JV **may** allow both parties to contribute **past performance**
 - Solicitations will define how a JV's past performance is evaluated
 - Agencies may weigh more heavily past performance of the joint venture entity itself, or may equally weigh the past performance of the joint venture and its members

CPARS
Contractor Performance Assessment Reporting System

Joint Ventures: Security Clearances



- JVs often require their own clearances
 - As a populated JV
 - JV would need (among other things) Facility Security Officer and Insider Threat Program Senior Official
- 2020 NDAA indicates that each member can rely on their own security clearances





Joint Ventures: Cost Accounting Issues

- Cost Accounting Issues for JVs
 - JVs that qualify as “segments” typically receive both direct and indirect cost allocations from members or parent entities
 - Joint venture may have to file separate CAS Disclosure Statement
 - Note that the term “segment” is specifically defined to include “those joint ventures and subsidiaries (domestic and foreign) in which the organization has less than a majority of ownership, but over which it exercises control.” CAS 403-30(a)(4).
 - Direct charges can include interorganizational transfers for services or materials
 - Indirect charges can include home office expenses such as:
 - Insurance payments
 - Benefit plan payments
 - Residual home office expenses
 - Other indirect charges can include:
 - Occupancy costs
 - Data processing costs
 - IR&D and B&P costs may not be equally recovered (CAS 420)

Joint Ventures: Small Business Issues

- JVs usually create **affiliation** between partners, but...
- Two small businesses may form a JV as long as each concern is small under the applicable size standard and the combined JV will likely continue to qualify as “small”
- A large business Mentor and its small business Protégé are not considered affiliated as a result of a **Mentor-Protégé Agreement** approved by the SBA prior to submitting any offers as the JV (MPAs will be discussed in more detail in a future class)



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Joint Ventures: Small Business Issues (cont'd)

- Small Business JV:
 - Should be formally incorporated
 - Must be in writing and lay out the specifics of the arrangement, including responsibilities
- JVs must comply with the Limitations on Subcontracting (more on that in upcoming Sessions...)
- Joint and several liability: even if a party withdraws, the other party remains responsible
 - Important for parties to vet each other before entering into JV
- Failure to comply with SBA regulations could be ground for suspension or debarment, as well as potential False Claims Act liability



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Next Session on March 19, 2023

- Session 3: Small Business Programs



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