Teaming Agreements and Subcontract Arrangements in Federal Government Contracting

W. Barron A. Avery
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Overview

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• Subcontract Arrangements
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  – Advantages and Disadvantages
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• Teaming Agreements
  – Definitions and Key Concepts
  – Advantages and Disadvantages
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• Conclusion
Subcontract Arrangements
Subcontract Arrangements (Definitions and Key Concepts)

- “Prime Contractor” v. “Subcontractor”
  - Prime Contractor = Direct Privity
  - Subcontractor = No Privity, But Supports Federal Work

- “Subcontractor” v. “Supplier” v. “Vendor”
  - The “It’s Just a PO” Trap
  - “Any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.” (FAR 44.101)
  - Includes Second, Third, Fourth, Etc. Tier Subcontractors
Subcontract Arrangements (The Flowdown Conundrum)

- The Flowdown Requirement
  - FAR Clauses
  - Government Contracting Principles (Termination, Changes, Etc.)

- Flowdown Applicability Depends on Position
  - Prime Contractor → Over-inclusiveness
  - Subcontractor → Limit Flowdowns
Subcontract Arrangements (Negotiating Flowdowns)

• Prime Contractor Position
  – Flowdown All Required Flowdown Clauses
  – Over Inclusive Approach v Targeted Flowdowns

• Subcontractor Position
  – Not All Flowdowns Required
  – “Only As Applicable” Trap (What Is Applicable?)
  – Negotiate Only Required Clauses!
Subcontract Arrangements (Collateral Policies)

• Small Business Policies
  – Limitations on Subcontracting (50% of Funds)
  – Small Business Subcontracting Plans (Limits Ability to Subcontract With Any Entity)

• Equal Employment Opportunity
  – Aggressive Interpretation by OFCCP

• Financing Considerations
  – Pay-When-Paid Terms
  – Sponsored Claims Against Government
Teaming Agreements
Teaming Agreements (Definitions and Key Concepts)

• “Teaming Agreement”: Agreement to Act as Prime/Sub
• “Joint Venture”: Legal Entity
• “Program” v. “Procurement”
  – Procurement = Individual RFP
Teaming Agreements (Trade-Off)

- **Advantages**
  - Complementary: Leverage Each Party’s Strength to Maximize Chance for Award
  - Risk Management: Reduce Up-Front Investment

- **Disadvantages**
  - Shared Control: Management Inefficiencies, Lines of Authority Blurred
  - Staffing and Employment: Brain Drain, Administrative Headache
Teaming Agreements (Key Considerations)

- **Enforceability**
  - Gaps Typical in TAs
  - But . . . . Gaps = Questionable Enforceability
  - Jurisdiction Important

- **Exclusivity**
  - Increases Enforceability, Protects Exchange of Information
  - But . . . . Exclusivity = Less Flexibility

- **Performance and Compliance Management**
  - Roles Must be Defined
  - Division of Responsibility Must be Clear
Questions?
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