

BakerHostetler

Teaming Agreements and  
Subcontract Arrangements in  
Federal Government Contracting

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# Overview

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- Introduction
- Subcontract Arrangements
  - Definitions and Key Concepts
  - Advantages and Disadvantages
  - Collateral Policies and Other Considerations
- Teaming Agreements
  - Definitions and Key Concepts
  - Advantages and Disadvantages
  - Key Considerations
- Conclusion

# Subcontract Arrangements

# Subcontract Arrangements (Definitions and Key Concepts)

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- “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)

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- 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)

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- 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)

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- 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)

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- “Teaming Agreement”: Agreement to Act as Prime/Sub
- “Joint Venture”: Legal Entity
- “Program” v. “Procurement”
  - Program = Life Cycle of Weapon System, Etc.
  - Procurement = Individual RFP

# Teaming Agreements (Trade-Off)

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- 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)

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- 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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