



Teaming Agreements

Devon E. Hewitt

Chair, Government Contracts Practice

PROTORÆ
LAW



CONNECT



EDUCATE



CHAMPION

TEAMING AGREEMENTS



About SECAF

Founded in 2001, the Small and Emerging Contractor Advisory Forum (SECAF) enables the small and emerging government contractor to achieve maximum growth rates in a highly competitive marketplace. Providing members with business resources, access to influencers, government agencies, advocacy opportunities and education, the group is an important resource for a growing company. SECAF also serves the medium to large government contractors, providing invaluable introductions to specialized small businesses that enable the overall contracting community to work successfully in tandem. With more than 350 members, the organization boasts one of the highest retention rates in the Washington, DC metropolitan region.



Devon E. Hewitt

Devon Hewitt has over 20 years' experience in the field of government contracts representing small, mid-tier and large government contractors. Ms. Hewitt primarily is a litigator and has represented clients in over 100 protests before various federal agencies, including SBA and FAA, the U.S. Court of Federal Claims, and the GAO. Ms. Hewitt also represents clients in subcontract and other disputes in civil courts and in arbitrations. On the transactional side, she regularly reviews teaming agreements and subcontracts and advises companies on FAR compliance. Ms. Hewitt has considerable experience in SBA's small business contracting programs, having authored a treatise and twice served as an expert witness on the subject.

Devon E. Hewitt

*Chair, Government Contracts
Protorae Law PLLC*

703.942.6746

dhewitt@protoraelaw.com

Ms. Hewitt sits on the SECAF Board, was appointed its General Counsel in 2018 and serves as the Chair of the Legislative & Regulatory Committee.

Prior to joining Protorae Law, Ms. Hewitt was a partner at Piliero Mazza in D.C. and a partner in the Government Contracts practice of Pillsbury. She is a graduate of Smith College (*magna cum laude* and Phi Beta Kappa) and the University of Virginia School of Law. Ms. Hewitt has been named one of the Legal Elite by Virginia Business Magazine for the last three years and a Best Lawyer 2019 by Arlington Magazine.

Teaming Agreements



PROTORÆ LAW

 **SECAF**
Small and Emerging Contractors Advisory Forum

What is a Teaming Agreement?



CONNECT

EDUCATE

CHAMPION

- Defined in the Federal Acquisition Regulation, FAR Subpart 9.6
- Subpart titled “Contractor Team Arrangements”
 - FAR identifies two types of “contractor team arrangements”
 - **Prime/sub**
 - *“Teaming Agreements” typically reflect a prime/sub arrangement*
 - **Joint Venture/partnership**
 - Joint Venture Agreement/Operating Agreement/Partnership Agreement
- Not to be confused with a “CTA” – Contractor Team Arrangement – used for GSA Schedule buys



PRIME Issues and Concerns

CONNECT
EDUCATE
CHAMPION

- **Prime**
 - Wants to enhance ability to receive a prime contract award
 - Wants to maintain control of proposal process
 - Wants flexibility following contract award



CONNECT

EDUCATE

CHAMPION

- **Sub**
 - Wants a return on its investment of time and money in the proposal
 - Wants a subcontract
 - Wants certain type or percentage of work
 - Wants a certain price
 - Wants to maintain, at a minimum, the agreed upon workshare and pricing during the entire term of the subcontract

PRIME / Proposal Preparation



CONNECT

EDUCATE

CHAMPION

- **Wants a “Price to Win” strategy**
 - Include a provision allowing prime to terminate teaming agreement if parties fail to agree to a competitive price
- **Wants to ensure participation of sub knowledgeable individuals in the process**
 - Include a provision requiring sub to provide such individuals or prime has right to terminate
- **Wants the timely submission of information by sub**
 - Include a provision requiring timely submission of information or prime has right to terminate
- **Wants sub to keep information exchanged confidential**
 - Include a confidentiality provision
- **Wants to control the process**
 - Include provision stating that prime makes all final proposal decisions
 - Include provision making prime the single point of contact with agency and prohibits sub contacts with agency

SUB / Proposal Preparation



CONNECT

EDUCATE

CHAMPION

- Wants to be identified in proposal as party responsible for certain type or amount of work set forth in the solicitation
 - Include a provision requiring prime to identify sub as responsible for work set forth in “Exhibit A”
 - Include a provision requiring prime to allow sub to review technical proposal content prior to submission
- Wants pricing that allows for a reasonable profit
 - Include a provision requiring prime to negotiate in good faith a price-to-win
 - Include a provision requiring prime to allow sub to review price proposal content prior to submission



CONNECT

EDUCATE

CHAMPION

- **Wants to limit its investment of time and money in the proposal effort**
 - Include provision stating sub only required to use “commercially reasonable” efforts to submit proposal and/or to position prime for contract award
 - Include a provision stating sub only required to respond to “reasonable” prime requests for help or information
- **Wants to keep its information confidential and maintain its competitive position**
 - Include confidentiality provision
 - Include provision which allows sub to submit pricing information directly to agency or in sealed envelope to prime

Confidentiality Provision



CONNECT

EDUCATE

CHAMPION

- **Prime - will likely be the recipient of most of the “confidential” information**
 - Include a provision requiring “confidential information” provided to prime to be clearly designated as confidential
 - Include a provision limiting time period during which prime must keep information confidential
 - Include a provision identifying “exceptions” to definition of “Confidential Information”
- **Sub – will likely be proving the majority of the “confidential information”**
 - Include a provision that defines information that should be considered “confidential information” without the requirement of expressly designating it as such
 - Include a provision requiring return, or destruction/certification of confidential information
 - Include a provision requiring receiving party to maintain confidentiality of information indefinitely
 - Include a provision requiring other team members to execute non-disclosure agreement with sub

Exclusivity



CONNECT

EDUCATE

CHAMPION

- **Prime wants exclusivity from the sub**
 - Include express provision requiring sub to be exclusive
 - Include provision stating prime may bring on other team members
 - Include provision requiring sub to notify prime if sub joins another team
- **Sub doesn't want to be exclusive to prime**
 - Include provision explicitly stating sub is not exclusive
 - Include provision stating that prime will be exclusive to sub or exclusive with respect to a certain type of work
 - Include provision stating that sub will be exclusive unless prime terminates the agreement or withdraws from the procurement



CONNECT

EDUCATE

CHAMPION

- **Prime Wants Flexibility**
 - Include provision where prime will negotiate subcontract terms
 - Make negotiation contingent on agency approval of sub, sub's acceptance of required and applicable FAR clauses, absence of OCI concerns, integrity of subcontractor

Award of a Subcontract - **Sub**



CONNECT

EDUCATE

CHAMPION

- **Sub wants subcontract commitment for pricing and workshare agreed by the parties during entire term of subcontract**
 - Include a provision stating upfront that pricing and workshare identified in teaming agreement will be included in subcontract
 - Include provision where sub commits to including only those FAR provisions in the subcontract that must be “flowed-down” to subcontractor
 - Include a provision requiring prime to exercise options or terminate only if the agency terminates the prime contract

Noncompetition



CONNECT

EDUCATE

CHAMPION

- **Prime wants to restrict sub from competing for follow-on work or obtaining work independently or indirectly from customer during subcontract performance**
 - Include provision prohibiting sub from participating, directly or indirectly, in any follow-on work
 - Include provision prohibiting sub from participating as sub to other teams during subcontract performance (multiple award/IDIQ contracts)
- **Sub wants to get as much work any way possible**
 - Delete any provision regarding follow-on work
 - Cite FAR clause entitled “Restrictions on Subcontracting”
 - Include provision allowing sub to team with other contractors if prime doesn’t intent to participate in task order competition

Termination



- **Prime – big concern, wants flexibility**
 - Include provision allowing prime to unilaterally terminate agreement where
 - Award made to another offeror – unless protested
 - Sub breaches agreement – materially breaches
 - Agency fails to approve use of sub – Prime must use best efforts to secure approval
 - Sub goes bankrupt or is suspended or debarred
 - An OCI is identified that, in Prime's sole determination, cannot be mitigated – good faith
 - Agency cancels program or procurement substantially modified – good faith
 - Failure to reach a “price-to-win” – good faith
 - Failure to negotiate subcontract terms within a defined period – beginning upon receipt

CONNECT

EDUCATE

CHAMPION

EXHIBIT A / Workshare



CONNECT

EDUCATE

CHAMPION

- **Prime – wants flexibility**
 - Include provision simply stating that the parties contemplate work will be allocated in a certain matter
 - “Best athlete” approach
 - Include caveats: agency approval, compliance with law/small business regulations, conditioned on satisfactory performance
 - Include provision requiring renegotiation in the event of solicitation amendments
- **Sub – wants binding language**
 - Identify specific task areas, number of hours/FTEs/certain positions
 - Include provisions allowing for transfer of incumbent positions, increase in FTEs based on bringing work to subcontract or right of first refusal

Enforceability



CONNECT

EDUCATE

CHAMPION

- Subject to state law
 - Is the agreement an “agreement to agree”?
- Certain provisions of a teaming agreement clearly enforceable
 - Pre-award obligations, confidentiality
- Post-award provisions difficult to enforce
 - Workshare provisions
 - Is the agreement an “agreement to agree?”
- Survival
- Subcontract integration clause

TEAMING AGREEMENTS

Q&A



PROTORÆ LAW

 **SECAF**
Small and Emerging Contractors Advisory Forum

WEBSITE: www.secaf.org



EMAIL: info@secaf.org

Thank you for joining us.

Thank you to our sponsor

PROTORÆ
LAW



CONNECT



EDUCATE



CHAMPION