

WINNING GOVCON STRATEGIES

2021

FEBRUARY 10-11, 2021

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WEDNESDAY FEBRUARY 10, 2021

FOCUS ON RELATIONSHIP BUILDING



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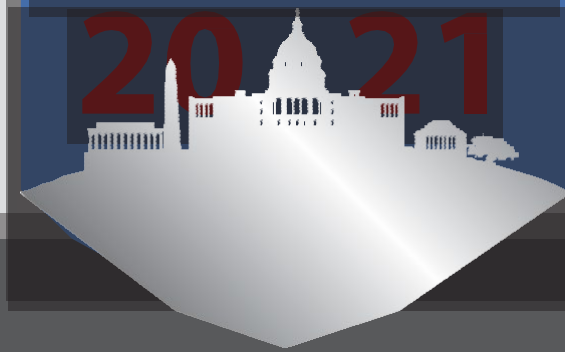
Devon Hewitt
PROTORÆ LAW

Teaming for Success



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About Devon Hewitt

Devon Hewitt, a partner at Protorae Law, has over 25 years' experience in the field of Government Contracts and represents emerging, small, mid-size and large government contractors located across the United States and abroad. Ms. Hewitt leads the firm's Government Contracts practice, and is best known as a bid protest attorney, having participated in well over 100 bid protests lodged at various federal agencies, including the Small Business Administration and the Government Accountability Office. In addition to bid protests, Ms. Hewitt represents government contractors in a wide variety of transactional matters such as the drafting and negotiation of subcontracts and teaming, cooperative, nondisclosure, non-compete, operating, joint venture, commercial vendor and "OTA" agreements. Ms. Hewitt recently was appointed General Counsel of the Small Emerging Contractor Advisory Forum (SECAF) and has been a member of its Board for over five years. She is active in the National Veterans Small Business Council and represents many SDVOSBs and VOSBs.

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TEAMING AGREEMENTS



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What *is* a Teaming Agreement?

- 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



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What is the *Purpose* of a Teaming Agreement?

- Purpose of a teaming agreement is to identify, specify and confirm each team member's responsibilities to the team and other team members regarding the submission of a proposal in response to a solicitation
- Address ability to team members to team with other potential offerors
- Ensure information exchanged between team members is subject to confidentiality obligations
- Prohibit poaching of employees/candidates
- Purpose is not to allocate workshare – *but workshare provisions typically receive the most attention*



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***Prime* Issues and Concerns**

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



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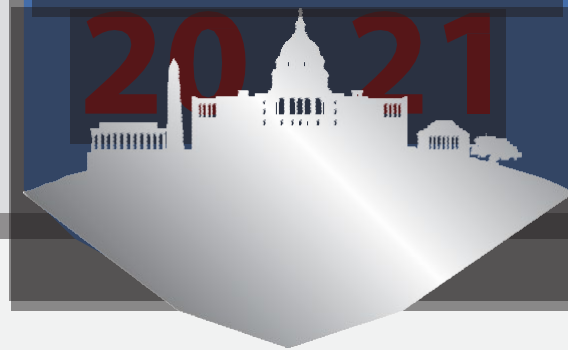
***Sub* Issues and Concerns**

- 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



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Prime / Proposal Preparation

- 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*



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***Sub* / Proposal Preparation**

- 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*



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***Sub* / Proposal Preparation (cont.)**

- 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*



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Confidentiality Provision

- 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*



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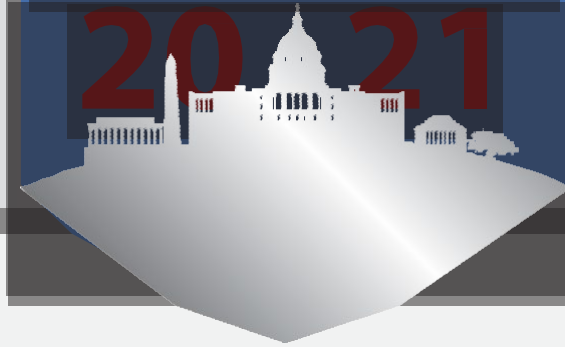
Exclusivity

- 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*



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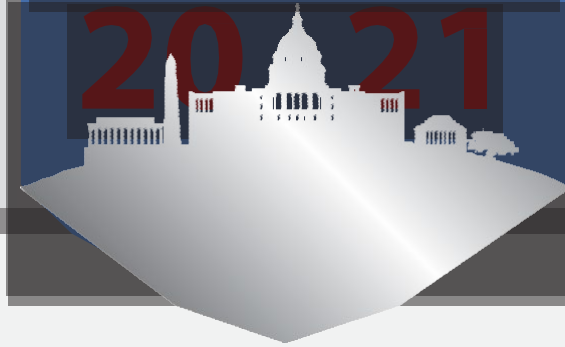
Award of a Subcontract

- 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*
- 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*



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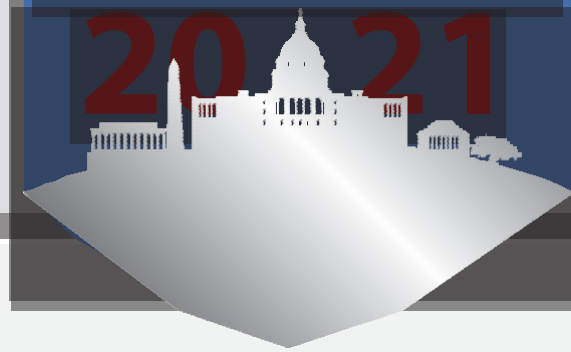
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Noncompetition

- 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*



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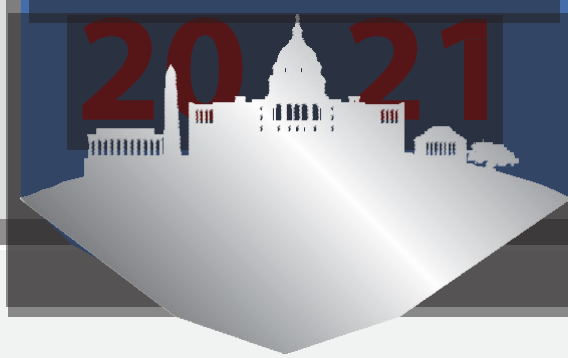
Exhibit A / Workshare

- **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*



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Enforceability

- 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



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QUESTIONS?

