

Government Contracts: Teaming Agreements and Other Teaming Arrangements

by Erin L. Toomey, Foley & Lardner LLP, with Practical Law Commercial Transactions

Status: **Maintained** | Jurisdiction: **United States**

This document is published by Practical Law and can be found at: us.practicallaw.tr.com/4-547-6585

Request a free trial and demonstration at: us.practicallaw.tr.com/practical-law

A Practice Note addressing teaming agreements and other teaming arrangements under the Federal Acquisition Regulation (FAR). This Note discusses the pros and cons of each teaming mechanism and reviews the most important clauses to include in a teaming agreement, including the designation of a prime contractor and subcontractor. This Note also provides tips on avoiding drafting pitfalls, such as one-sided and vague exclusivity provisions.

Using teaming agreements and other teaming arrangements to pursue federal government contract opportunities has become increasingly popular in the past several years. These teaming mechanisms permit government contractors to better respond to solicitations while offering the federal government the benefits of an improved team bid.

This Note discusses the key principles of teaming agreements and other teaming arrangements under the Federal Acquisition Regulation (FAR) and the benefits and drawbacks of each. This Note also analyzes the top clauses to include in a teaming agreement and provides tips on drafting an enforceable teaming agreement.

Teaming Arrangements Under the FAR

Subpart 9.6 of the FAR, Contractor Team Arrangements, distinguishes between:

- **Teaming agreements.** A teaming agreement is a contract between a potential prime contractor and another company to act as a subcontractor under a specified federal government contract or acquisition program.
- **Other teaming arrangements.** Two or more companies form a new legal entity to act as a potential prime contractor, by creating either:
 - a partnership; or
 - a joint venture.

(48 C.F.R. § 9.601.)

Both types of teaming arrangements are typically formed before a prime contractor submits an offer to the government, but they can also be entered into later in the procurement process, including after the federal government awards the contract (48 C.F.R. § 9.602).

Teaming agreements and other teaming arrangements provide efficiencies for both the government and government contractors because they:

- Allow the contractor team members to complement each other's unique capabilities.
- Offer the government the best combination of performance, cost and delivery for the system or product being acquired.

(48 C.F.R. § 9.602.)

The federal government recognizes the validity of contractor teaming agreements and other teaming arrangements if the contractors identify and disclose them to the government. If a teaming agreement or another teaming arrangement is formed after the submission of an offer, it must be disclosed to the government before the agreement or arrangement becomes effective (48 C.F.R. § 9.603).

Benefits and Drawbacks

When deciding whether to enter into a teaming agreement or another teaming arrangement (by forming a partnership or joint venture), the parties should consider the benefits and drawbacks of both approaches.



Benefits of Other Teaming Arrangements

The potential benefits of forming a separate legal entity include:

- The new entity can be established to cover multiple solicitations and contracts.
- The separate entity can benefit from the combined bonding capacity of its member companies.
- Liability can be limited to the new legal entity if the parties form a limited liability partnership.
- The entity may be able to avoid the high cost structure of its member companies, which is important if price is a major source selection criterion.

Drawbacks of Other Teaming Arrangements

The potential drawbacks of forming a new legal entity include:

- In a joint venture, each member company may have liability for the obligations of the joint venture.
- Management issues or partner disagreements may be difficult to mitigate and may result in delayed decision making.
- Member companies may be locked into a relationship with one another for a longer period of time than intended.
- Member companies will likely be considered “affiliated” for small business size calculations (13 C.F.R. § 121.103). For more information on small business concerns in government contracting, see [Practice Note, Government Contracts: Small Business Concerns](#).

Benefits of Teaming Agreements

Teaming agreements, unlike other teaming arrangements, often only apply to one solicitation or to a specific government program and therefore:

- Limit the parties’ obligations to one another.
- Team members can tailor their negotiations to the specific solicitation and provide for a variety of termination provisions.
- Allow parties who are unfamiliar with each other and therefore reluctant to jointly form a new entity to pursue the solicitation.
- Reduce risk by requiring the prime contractor and the subcontractor to bear their own proposal preparation costs.
- Provided the parties comply with the limitations on subcontracting (48 C.F.R. § 52.219-14), the parties will

not be considered “affiliates” for small business size calculations.

Drawbacks of Teaming Agreements

Because teaming agreements generally apply to one solicitation or program, the drawbacks to a teaming agreement include:

- The renegotiation of a teaming agreement for each solicitation.
- The risk that after the prime contractor receives the prime contract, the prime contractor and the proposed subcontractor will be unable to reach an agreement on the terms of a subcontract.
- The prime contractor is the only party in privity of contract with the government, and therefore bears the entire risk of contract performance.

Due Diligence Before Teaming

Regardless of the form of the teaming arrangement, contractors should perform the following due diligence on their prospective teaming partners:

- Confirm that the proposed teaming partner is not suspended, debarred or proposed for debarment by checking the System for Award Management (SAM) [website](#).
- Consider the proposed teaming partner’s past performance history.
- Confirm the proposed teaming partner is in a sound financial position to perform any resulting prime contract or subcontract.
- Subcontractors should consider the likelihood that the proposed prime contractor will receive the prime contract award.
- Confirm that the proposed teaming partner does not have an actual or potential organizational conflict of interest that could prevent the team from receiving the contract award (48 C.F.R. § 9.500 et seq.).

For more information on conducting due diligence for a commercial transaction generally, see [Practice Note, Risk-Based Due Diligence of Third Parties in Commercial Transactions](#).

Top Clauses to Include in a Teaming Agreement

While the type and complexity of teaming agreements can vary greatly depending on the industry, government agency, and the particular solicitation or contract award,

Government Contracts: Teaming Agreements and Other Teaming Arrangements

the parties should consider including the following general clauses in the teaming agreement:

- **Designation of a prime contractor and a subcontractor.**

In a teaming agreement, the federal government typically requires the designation of one party as the prime contractor and the other party as the subcontractor. The government may reject a proposal that has two or more parties acting as the prime contractor.

- **Purpose and scope of the agreement.** Because teaming agreements are established for a limited purpose, the parties should define the solicitation or federal government program for which the parties want to team.

- **Confidentiality.** As the parties are likely to share confidential and proprietary information with one another when preparing and submitting a proposal to the federal government, they should ensure that their confidential and proprietary information remains protected. They can do this by either:

- including confidentiality clauses in the teaming agreement (see, for example, [Standard Clauses, General Contract Clauses: Confidentiality \(Short Form\)](#)); or
- incorporating by reference a previously executed non-disclosure agreement between the parties (see [Standard Documents, Confidentiality Agreement: General \(Mutual\)](#) and [Confidentiality Agreement: General \(Short Form, Mutual\)](#)).

- **Protection and allocation of intellectual property.**

If the parties anticipate sharing existing information or creating new technical data, computer software, inventions, patents, or other confidential or proprietary information when submitting a proposal or performing the contract, the teaming agreement is a good place for the parties to include provisions that protect and allocate these rights. For more information on intellectual property categories, see [Practice Note, Intellectual Property: Overview](#).

- **Division of responsibilities between the prime contractor and the subcontractor and definition of the relationship of the parties.** The parties should clearly allocate the scope of work between the prime contractor and the subcontractor. The parties should also clarify:

- their respective responsibilities in creating and submitting the proposal to the federal government;
- how the parties will allocate the costs of proposal preparation between them; and
- that the relationship between the parties is that of independent contractors and therefore neither party

has the right to bind the other party (see [Standard Clause, General Contract Clauses: Relationship of the Parties](#)).

- **Duration of the agreement and termination provisions.**

Often teaming agreements provide for the termination of the agreement on the occurrence of one or more of several events including, but not limited to:

- the award of a subcontract by the prime contractor to the subcontractor (at which time, the parties will negotiate the actual subcontract);
- the government’s award of a contract to an entity other than the prime contractor;
- the government’s cancellation of the solicitation without award;
- the parties’ inability to agree on the terms and conditions of a subcontract;
- the suspension, debarment, proposed debarment, or ineligibility to enter into a federal government contract of either party;
- an organizational conflict of interest that cannot be mitigated;
- the prime contractor must obtain government approval of the subcontract and has not, despite reasonable and good faith efforts; or
- at the election of either party, on written notice.

For an example of a term and termination provision for commercial contracts generally, see [Standard Clauses, General Contract Clauses: Term and Termination](#).

- **Disputes clause.** To provide for a reasonable degree of certainty about how potential disputes will be handled, the parties should include a disputes provision that addresses:

- the process for disputes, such as mediation, arbitration, or litigation (see [Standard Clauses, General Contract Clauses: Alternative Dispute Resolution \(Multi-Tiered\)](#));
- choice of law (see [Standard Clauses, General Contract Clauses: Choice of Law](#)); and
- choice of forum (see [Standard Clauses, General Contract Clauses: Choice of Forum](#)).

- **Limitation of liability and indemnification.** The parties should also consider including limitation of liability and indemnification clauses. A limitation of liability clause is important as it prevents the parties from seeking special, incidental, consequential or punitive damages from the other party that are significantly in excess of

the potential harm caused by a breach of contract. An indemnification clause allows the parties, among other things, to:

- customize their risk allocation;
- provide for a degree of certainty of recourse; and
- pursue certain remedies that would otherwise be unavailable, such as attorney's fees.

For more information on contractual remedies, see [Interaction Between Indemnification and Other Contractual Remedy Provisions Checklist](#). For more information on limitation of liability, see [Standard Clauses, General Contract Clauses: Limitation of Liability](#). For more information on indemnification, see [Practice Note, Indemnification Clauses in Commercial Contracts](#).

- **Equitable remedies.** The parties should also address equitable remedies for a breach of the teaming agreement. Equitable remedies, such as injunctions, are particularly important if the teaming agreement provides for exclusivity or contains confidentiality obligations because they allow the non-breaching party to immediately stop the breaching party's damaging conduct. For more information on equitable remedies, see [Practice Note, Contracts: Equitable Remedies](#).
- **No assignment without consent.** The parties should consider limiting each party's ability to assign the teaming agreement to a third party without the consent of the other party to avoid the possibility of being obligated to team with a competitor or an entity that has not been properly vetted through due diligence. The parties should also address in the assignment provision whether consent is required if there is a change in control of the other party through a merger or an acquisition. For more information on assignment and a sample clause, see [Standard Clauses, General Contract Clauses: Assignment and Delegation](#).
- **Exclusivity and non-competition.** The parties should consider including:
 - an exclusivity clause to prevent the other party from participating in a proposal with another prime contractor or subcontractor for the same procurement covered by the teaming agreement and for the work allocated to the subcontractor;
 - an exception to exclusivity for direct subcontractor sales to the government to avoid violating FAR clause 52.203-6, "Restrictions on Subcontractor Sales to the Government (48 C.F.R. § 52.203-6)," which prohibits a higher-tiered contractor from preventing a subcontractor from selling goods or services directly to the federal government; and

- a non-solicitation clause that prohibits both parties from soliciting employees of the other party for a specified period of time (see [Standard Clauses, Confidentiality Agreement: Non-Solicitation Clause](#)).

- **Nature and key terms of the expected subcontract between team members.** Although it is often difficult to identify and negotiate all of the proposed subcontract terms in the teaming agreement, the parties can identify the following terms:

- the contract type (for example, firm fixed-price or cost plus fixed-fee) (see [Practice Note, Federal Government Contracts: Overview: Different Types of Federal Government Contracts](#));
- the payment terms (for example, milestone payments or progress payments);
- the duration of the subcontract; and
- other key terms (for example, if the subcontractor requires the subcontract award to be a FAR Part 12 Commercial Product or Commercial Service subcontract, the parties can include this requirement in the teaming agreement to prevent any issues during subcontract negotiations). For more information on commercial product and commercial service contracting, see [Practice Note, Government Contracts: Reduced Risk Through Commercial Product and Commercial Service Contracting](#).

Drafting an Enforceable Teaming Agreement

Avoiding an Unenforceable Agreement to Agree

Virginia courts have consistently found some teaming agreements to be agreements to agree in the future and therefore unenforceable as too vague and indefinite (see, for example, *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 939 F.Supp.2d 572 (E.D. Va. 2013), *aff'd*, 549 Fed. Appx. 211 (4th Cir. 2014). To increase the likelihood that a teaming agreement is enforced against a teaming member and not construed by a court as an unenforceable agreement to agree, the agreement should include an unqualified obligation to award and accept a subcontract, at least for:

- Scope.
- Payment.
- Place of performance.
- Duration.

Government Contracts: Teaming Agreements and Other Teaming Arrangements

The parties should:

- Use language that creates legal obligations, such as the prime contractor “shall subcontract” with the subcontractor.
- Avoid language used in preliminary agreements, such as the parties will enter into “good faith negotiations.”

The parties should seek to include as many definitive provisions as possible to help avoid the teaming agreement’s characterization as vague and indefinite. To the extent possible, the teaming agreement should:

- Contain a detailed statement of work defining the responsibilities of the parties.
- Include clear subcontract pricing.
- Have a defined duration tied to the length of the prime contract.
- Attach the subcontract as an exhibit.
- Be amended either before or shortly after the submission of the proposal to better define the scope of work and pricing terms.

The parties should **avoid** including in the teaming agreement:

- A clause providing for the termination of the agreement if the parties cannot agree on a subcontract after a reasonable period of good faith negotiations.
- Virginia as the governing law, considering unfavorable decisions regarding the enforceability of teaming agreements such as the *Cyberlock* case.

Avoiding One-Sided or Vague Exclusivity Provisions

Parties to a teaming agreement often include exclusivity provisions barring the pursuit of the same solicitation or contract award with a third party. However, sometimes the parties fail to consider the consequences of one-sided exclusivity obligations where only one of the parties is prohibited from teaming with a third party (see *X Technologies, Inc. v. Marvin Test Sys., Inc.*, 719 F.3d

406 (5th Cir. 2013)). These provisions can often be the subject of subsequent litigation. Accordingly, the parties should consider including exclusivity and confidentiality obligations that:

- Are mutual.
- Prevent not only teaming with a third party, but also prohibit an individual bid by one of the parties.
- Survive the termination of the teaming agreement. For more information and a sample survival clause, see [Standard Clauses, General Contract Clauses: Contractual Statute of Limitations](#).
- Are severable from other provisions of the teaming agreement. For more information and a model severability clause, see [Standard Clauses, General Contract Clauses: Severability](#).

Executive Order 14042

On September 9, 2021, President Biden issued Executive Order 14042 (86 FR 50985) titled Ensuring Adequate COVID Safety Protocols for Federal Contractors. This Executive Order mandates, among other things, that some federal contractors and subcontractors require specified employees to be vaccinated against COVID-19, except in limited circumstances that legally entitle the employee to an accommodation. On September 24, 2021, the Safer Federal Workforce Task Force published guidance for federal contractors and subcontractors (see [Safer Federal Workforce Task Force: COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors](#)) describing the COVID-19 safety protocols required by the Executive Order. For more information, see:

- [Practice Note, Vaccination in the Workplace: Vaccination Requirements for Federal Contractors](#)
- [FAQs: Federal Contractors](#)
- [Federal Acquisition Regulation \(FAR\): Issuance of Agency Deviations to Implement Executive Order 14042](#).

For legal challenges and status of the federal contractor vaccination requirement, see [Practice Note, COVID-19: Employment Law and Development Tracker: Federal Contractor Vaccine Mandate](#).

About Practical Law

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call 1-800-733-2889 or e-mail referenceattorneys@tr.com.