FAR 9.6 discusses "contractor team arrangements," defined as "(1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program." The FAR goes on to state that the teaming arrangements "may be desirable" in order to create teams that "offer the Government the best combination of performance, cost, and delivery" for the resulting contract award.

It is the policy of the U.S. Government to "recognize the integrity and validity of contractor team arrangements; provided, the arrangements are identified and company relationships are fully disclosed in an offer or, for arrangements entered into after submission of an offer, before the arrangement becomes effective."

Importantly, the FAR notes that the government customer will still "hold the prime contractor fully responsible for contract performance, regardless of any team arrangement …" In other words, the prime contractor cannot transfer contract execution risk to its team members (which is an assertion we've made several times on this blog).

There is a long-standing controversy regarding the enforcement of teaming agreements. There are legal decisions that have held that teaming agreements are not enforceable; calling them mere "agreements to agree." However, some legal forums have upheld the enforceability of such agreements. So it is critical to draft the teaming agreement so that a court will enforce it, should there be a dispute.

At last two legal practitioners believe that "A teaming agreement is only worthwhile if it is enforceable. Without an enforceable teaming agreement, a potential subcontractor could leave a prime contractor unable to perform or a prime contractor could simply disregard a subcontractor once it receives an award."[1] Those authors wrote—

In *Cyberlock*, a party to the teaming agreement sued for the right to a subcontract promised to it under that agreement. Despite the fact that the parties had a signed teaming agreement, the court found the agreement unenforceable because it (like most teaming agreements) did not include specific subcontract terms, and permitted the parties to terminate the agreement if they did not successfully negotiate the subcontract. For these reasons, the court concluded that a signed teaming agreement was simply ‘an agreement to negotiate in good faith to enter into a future subcontract,’ that is ‘precisely the type of agreement to agree that has consistently and uniformly been held unenforceable in Virginia.’

Thus, in that case the prime contractor won the subcontract award (perhaps based at least in part on the qualifications of the subcontractor it had teamed with) but the subcontractor received nothing.

Other issues that may arise with teaming agreements include: (1) teaming with a subcontractor that is debarred or proposed for debarment (not a good idea), (2) having a small business act as prime and a large business act as subcontractor, even though the large business will in fact manage and perform most of the work (the “ostensible subcontractor” issue), and (3) and evaluation of the past performance of the team as a single entity versus evaluation of the past performance of each of the team members. We have also written (and published an article) on the evaluation of joint ventures, which is a related topic.

However, having the right team member may well be helpful in contracting officer responsibility determinations. For example, in one bid protest at the GAO, the decision stated, “As a general rule, the experience of a technically qualified subcontractor or third party--such as an affiliate or consultant--may be used to satisfy definitive responsibility criteria relating to experience for a prospective prime contractor. In considering whether the experience of a third party subcontractor or affiliate may be relied upon by a prime bidder to meet an experience criterion, we examine the record for evidence of a commitment by the third party to the bidder’s successful performance of the work.” (*Charter Environmental, Inc.*, B-297219, 12/05/2005.) Thus, one important reason for choosing a team member is that the company will bolster the prime’s experience assessment. But note the need for a *committed relationship* between the two entities; in the absence of evidence of a commitment, the GAO may find that a contracting officer should not have used the experience of a proposed subcontractor to bolster the experience of the proposed prime contractor. The right language in the teaming agreement can provide that evidence.

Looking to post-award matters, typically the biggest area of dispute between team members concerns the amount of workshare. Usually the teaming agreement specifies an amount of work that each team member will receive, should the team be successful and receive the contract for which it is submitting a proposal. The exact language regarding expected workshare is critically important to get right. For instance, on the WIFCON discussion forum, there was a recent post by somebody who was dealing with a workshare ratio based on revenue. If you think about it for a minute, you'll see why basing the workshare ratio on revenue is a bad idea. Using a percentage of direct labor dollars, or direct labor hours, or full-time equivalent (FTE) heads is a much better idea.

Generally, the agreed-upon workshare is a target. It should be treated as a goal, not a contract term. There are many reasons why the exact workshare percentage may not actually come to pass, including (but certainly not limited to) customer changes to the initial statement of work, changes in personnel at one or both entities, and availability of funding at the CLIN or SLIN level. In other words, so long as the prime contractor is making a good faith effort to achieve the agreed-upon workshare, but falls short because of circumstances outside its control, the subcontractor likely has little if any legal recourse.

In any case, let's remember that the cost principle at FAR 31.205-47(f)(5) speaks to the allowability of legal costs in disputes between a prime and a subcontractor, or between team members. It states—

Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors arising from either—

(i) An agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or

(ii) Dual sourcing, coproduction, or similar programs, *are unallowable*, except when—

(A) Incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer, or

(B) When agreed to in writing by the contracting officer.

So if teaming partners are thinking about litigating any dispute about workshare, they should remember that the legal costs will be **unallowable** .

The DCAA publication, Selected Areas of Cost Guidebook, **Chapter 37** , discusses how DCAA auditors will audit teaming arrangements. It states—

The accounting for teaming arrangements should be consistent with the form of business organization that the teaming contractors have agreed to and disclosed in their proposal(s). For example, if the agreed-to arrangement is in the form of a joint venture, then this should be disclosed in the proposal(s) and the accounting principles applicable to a joint venture should be followed. FAR 9.603 requires contractors to fully disclose all teaming arrangements in their offers. If an arrangement is entered into after submitting an offer, then disclosure is required before the arrangement becomes effective.

Thus, it is important to know, and to document, and to disclose, the form of the post-award business organization within the teaming agreement itself. Further, the cost accounting practices used to estimate contract costs need to be consistent with the (future) business organization.

One issue that is likely to come up for the teaming partners is whether the post-award business organization is a separate CAS business unit or segment for purposes of allocating home office expenses. If the joint business organization is being treated as a separate business segment, then CAS 403 will require an appropriate allocation of all home office expenses for which the joint business organization receives a benefit. To the extent that certain home office expenses (e.g., IR&D or B&P expenses, HR expenses, etc.) are not being allocated, the teaming partners should be prepared to defend their decisions to DCAA. Conversely, if the joint business organization is not being treated as a separate business segment by one or more of the teaming partners, then that decision should also be defensible when the DCAA auditors inquire about it.

Finally, the post-award joint business organization may need a separate CASB Disclosure Statement. The decision regarding preparing and filing an individual Disclosure Statement will turn on the nature of the joint organization, its cost accounting practices, and how the teaming partners are treating it. The DCAA guidance states—

The need for a joint venture CAS Disclosure Statement depends upon the characteristics of the venture itself. The determination must be made on a case-by-case basis. Where the joint venture is the entity actually performing the contract, has the responsibility for profit and/or producing a product or service, and has certain characteristics of ownership or control, a Disclosure Statement should be required. Where the venture merely unites the efforts of two contractors performing separate and distinct portions of the contract with little or no technical interface, a separate joint venture disclosure may not be required.

As readers can tell, this is a complex topic. Typically, once a decision is made to enter into a teaming agreement (and that decision is usually made by the business development folks), the details are left to the legal or contracts folks to hammer out. But (as we trust we've demonstrated) the number of decisions to be made afterwards is daunting. Each decision, at each stage—from drafting the teaming agreement to choosing the workshare metric to choosing the nature of the post-award business organization—is critical. Mistakes at any juncture can result in a failed proposal effort or in disputes after contract award. Further, the DCAA audit considerations need to be addressed early in the relationship, lest the parties see significant margin degradation from adverse audit findings.

To sum this up: teaming agreements are important. The right teaming partner can help win a contract. But the wrong teaming partner, or the wrong teaming agreement language, can result in difficulties. You can avoid those difficulties by devoting appropriate attention to the details, and keeping in mind the various landmines that we've noted in this article.

[1] See "Ten Tips for Drafting Enforceable Teaming Agreements," by C. Apfel and D. Specht, at https://jenner.com/system/assets/publications/13413/original/Apfel_Specht_bloomberg.pdf?1415089419