

APTAC Body of Knowledge Competency Guide

C. Basics of Contracting with Government Entities

C.14.4 Special Subcontracting Relationships

Description

Two or more companies may enter into long-term relationships in various configurations. Some of these affect a small business's size determination, so they require special attention. This section discusses such arrangements as they relate to subcontracts.

Team subcontracts. When a prime contractor, or upper-tier subcontractor, intends to propose that a particular subcontract be used in the proposed work, and intends to rely on a specific company for that subcontract, the parties should agree in writing what that commitment is. This technique is especially appropriate when the specified subcontractor has expertise or technology essential to the project and unavailable elsewhere. Typically called a “teaming agreement”, this document can be in the form of a letter or can be more formally drafted. Its purpose is to bind the contractor and the proposed subcontractor to enter into a subcontract when the prime contract is awarded and is specific to this one project. Thus neither party can defect. Since the prime contract doesn't exist before it is awarded, a subcontract cannot exist until then. So the teaming agreement contains the proposed terms and scope that would be included in the intended subcontract, but these are contingent upon the award of the prime contract substantially as intended. Such a teaming agreement specifies that it expires upon either the award of the subcontract or the award of the prime contract to someone else. Therefore this type of teaming agreement is not considered “affiliation” under SBA regulations. Teaming agreements are addressed section D.7 of this Body of Knowledge but Team Subcontracts are specific to this section.

The prime contractor proposes the team, and is responsible for its relationship with the customer. In no way does a team subcontract create privity between the subcontractor and the government, nor does approval of the proposed team constitute consent under FAR Part 44 unless the government, at its discretion, issues specific wording that waives the consent requirement. The team subcontractor typically supports the prime contractor in its negotiations with the government, and may even participate in meetings among them, but always communicates through the prime contractor to avoid privity violations. In such multi-tier negotiations, documentation becomes even more important to prevent misunderstandings about who is responsible for what.

Mentor-Protégé Programs. A special type of teaming agreement can create a special type of relationship between a large and small business, in which the large business mentors the small business and helps in both technical and business development. In a Mentor-Protégé arrangement, either party can serve as the prime contractor and either can be the subcontractor, and either can enter into separate contracts without the other because they retain their individual identity. However, the mentoring relationship must be clearly spelled out in their M-P Agreement especially if the Mentor is the subcontractor. When the Mentor uses the Protégé as a subcontractor on a project, the consent requirement is typically waived in the government's

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approval of the M/P agreement, wherein the sub is already deemed “responsible”, so the acquisition can be non-competitive and only price reasonableness must be established by the Mentor for each purchase from the Protege supplier. The Mentor’s costs of mentoring the Protégé may be reimbursable if the customer modifies the prime contract to allow it. The Mentor gets credit on its Subcontracting Plan each time it awards a subcontract to the Protege. Perhaps the best description of such a program is in DFARS Appendix I, but other agencies have their own regulations for such programs. Typically, a mentor can have more than one protégé but a protégé can have only one mentor. These programs are discussed section D.6 and C.17 of the BOK, so this brief mention is an introduction to subcontracting issues. The PTAC counselor must keep in touch with the Protégé to be sure of getting documentation of each separate subcontract for reporting in accordance with the Solicitation for Cooperative Agreement Application (SCAA)

A special kind of Mentor Protégé Program exists within SBA’s 8(a) program, which is not specific to subcontracts and is not discussed here, but is sometimes confused with the above more common M-P relationship.

Joint Ventures. A Joint Venture is not a subcontract relationship. However, a Joint Venture, once established as an entity and once awarded a prime contract, may then enter into subcontracts. It is not uncommon for a Joint Venture to subcontract a portion of its prime contract scope to one or more of its own partners. The companies that create and own the Joint Venture retain their individual identities and can enter into other contracts, including as subcontractor with the J-V, which is a separate legal entity. The PTAC client should have competent legal counsel to assist with these relationships. See Section D.7 for more about Joint Ventures.

Association Agreements. Occasionally two individuals or companies contract as one party with two names, often identified as "X in association with Y", when they have not established an independent entity such as a partnership or joint venture or agreed on a subcontract relationship. The federal government will not enter into a prime contract like this, but the prime contractor or upper-tier subs may do so. The two associated entities should formalize their relationship in a letter agreement specifying the details of their arrangement to ensure no misunderstandings with their customer the prime contractor. Their subcontracts with third parties, as a business-to-business relationship, can be configured in both their names if permitted by local state law under UCC. While some cities have not objected to such an arrangement at the prime or sub level, federal contracting officers may frown on such subcontracts since their prime contract policy is that one of the associated parties must be responsible for the other one.

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References

Defense Federal Acquisition Regulation Supplement Appendix I—Policy and Procedures for the DoD Pilot Mentor-Protege Program is online at
http://www.acq.osd.mil/dpap/dars/dfars/pdf/r20131231/appendix_i.pdf

Federal Acquisition Regulation, Part 44, is online at
<http://www.acquisition.gov/far/current/pdf/FAR.pdf> .

Uniform Commercial Code: Since it is not uniform, each state posts its version, often on the Secretary Of State website, or on the state's "laws and regulations" website. Cornell University has posted the full text at <http://www.law.cornell.edu/ucc> along with links to some state versions and reference materials.