



# Teaming, Subcontracting and Negotiation: Legal and Contractual Aspects.

**2019 GovConNet Pathway to Growth  
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# Firm Overview



Miles & Stockbridge is a leading law firm with 200+ attorneys and offices in the mid-Atlantic region, including offices across Maryland, in Washington, D.C. and in Northern Virginia. Our lawyers help global, national, local and emerging business clients preserve and create value by helping them solve their most challenging problems.

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# Presenters



**Daniel S. Koch** practices government contracts law, cybersecurity, and technology licensing. For more than 25 years, Dan has advised government contractors, particularly professional services and information technology firms, on the full range of government procurement issues, including both counseling and litigation.

Typical counseling in this ever-changing and highly legalized environment includes structuring teaming agreements and subcontracts; preventing or negotiating disputes between prime and subcontractors at all levels; small business, minority, service-disabled veterans' and women-owned business set-aside contracting; specialized Contractor Teaming Agreements for the Federal Supply (GSA) Schedules; organizational conflicts of interest; protecting intellectual property in government contracts; terminations and claims; debarments and suspensions; and state and local procurements.

On the Government contracts litigation side, he has brought and defended innumerable bid protests before the Government Accountability Office (formerly the General Accounting Office, or GAO), the Court of Federal Claims, the Federal Aviation Administration's Office of Dispute Resolution for Acquisition (ODRA), agency protests and size protests before the Small Business Administration, qui tam (False Claims Act "whistleblower" cases), litigation before the boards of contract appeals, other administrative tribunals, arbitration panels and courts. When disputes between contractors arise, he counsels on or defends allegations of unfair competition and antitrust violations.

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**Chris Denny**, is a government contracts lawyer at Miles & Stockbridge. Chris assists his clients with a range of government contracting issues, including: small business program compliance (SBA, DOT, state and local programs); Buy American Act and Trade Agreement Act compliance, labor compliance (Davis-Bacon and Service Contract Act); and negotiating subcontracts and teaming agreements. Chris also has experience handling bid protest litigation and managing government contract claims and disputes.

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**Ryan Nuessle**  
COO, Bravium Consulting, Inc.



**Ryan Nuessle** co-founded Bravium Consulting, Inc. in 2010 and currently serves as the company's Chief Operating Officer. He has 15+ years of practical experience in the field of management and technology consulting. Previously, he climbed the ranks within a global, top-tier consulting firm, where he had a successful and rewarding career in delivering technology-based solutions within the Federal market.

Ryan has helped expand Bravium into a variety of industry verticals, such as Health Care, Defense, Civilian, State & Local, Financial, Legal and others. As a member of the executive team, Ryan strives to hire the best people and deliver exceptional customer service and solutions to Bravium's clients. As a result, the Bravium team has generated high customer satisfaction scores, and received multiple performance awards, while its excellent reputation has attracted new clientele and employees.



**Steven Flowers**  
COO, Knowesis Inc.

**Steven Flowers** is a Principal and the Chief Operating Officer of Knowesis Inc. He has 35 years of healthcare experience, including over 15 years of management consulting with large publicly-traded companies with expertise in program management, continuous improvement, government contracting, systems thinking, analysis, data mining, knowledge management, decision support, and information technology. During this career, Mr. Flowers has managed \$350M+ Federal contracts. Mr. Flowers served as a Malcolm Baldrige National Quality Award Examiner as well as an Air Force Quality Examiner. He had a distinguished military career as an Air Force Medical Service Corps officer with service in command positions and the Office of the Air Force Surgeon General. He was a key contributor to a military health project selected for Vice-President Gore's Golden Hammer Award. He also holds a Master Certificate in Government Contract Management, Six Sigma Black Belt, and Lean Six Sigma from Villanova University. Mr. Flowers has Bachelor of Science in Public Health Administration from the University of North Carolina at Chapel Hill, a Master of Science in Systems and Management Air Force Institute of Technology and a Master of Science in Law from Champlain College.

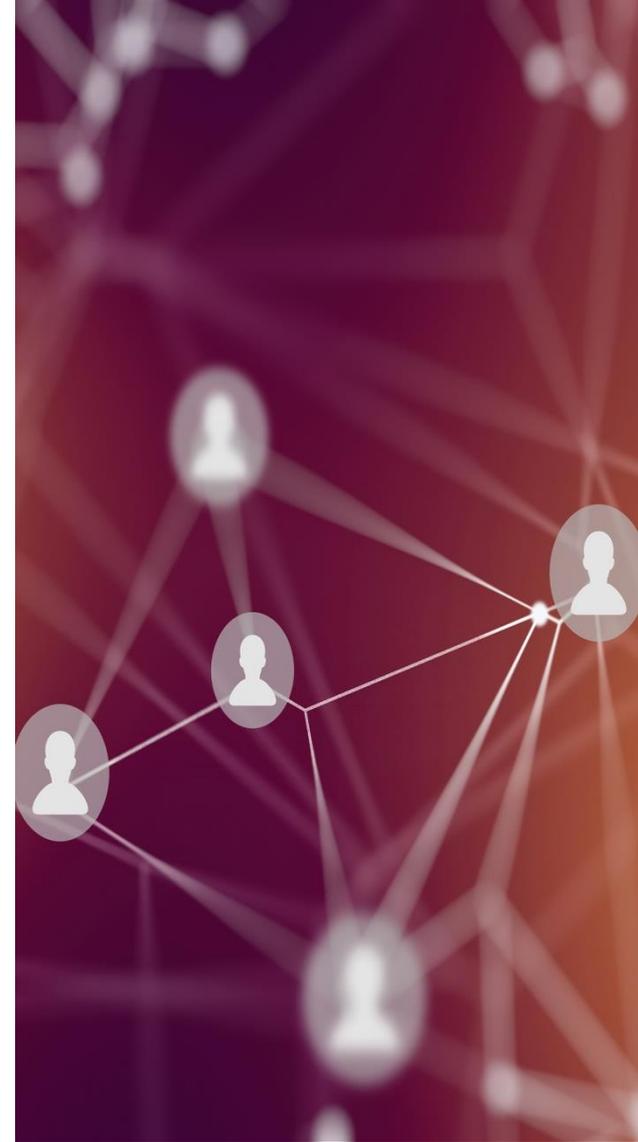


# Teaming Agreements

- For today's discussion, only agreements to form a prime contractor/ subcontractor relationship, to pursue identified contracting opportunities.
- Excluded from today's discussion:
  - Joint ventures
  - Mentor-protégé agreements
  - GSA Schedule Contractor Team Arrangement (CTA)

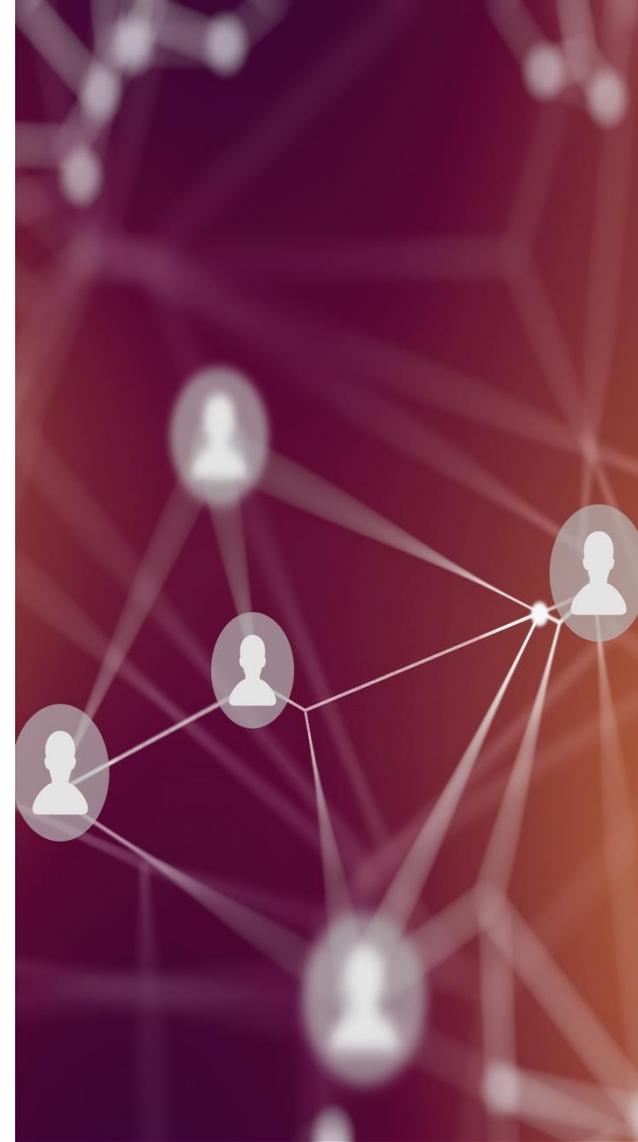
# Is a teaming agreement enforceable? – Pre-award commitments

- Enforceability of the agreement is the fundamental issue surrounding TAs.
- Typical preaward commitments:
  - Exclusive participation (sole proposal) to win award for this procurement.
  - Nondisclosure of confidential information.
  - Any other obligations through submitting proposal.
- Should be enforceable.
- But rarely controversial.



# Is a teaming agreement enforceable? – Post-award subcontract

- Enforceability of the subcontract award, after the proposal wins the prime contract, is the fundamental issue surrounding teaming agreements.
- Teaming Agreements often state that the parties will negotiate the details of the subcontract, typically after award of the prime contract.
- Maryland and Virginia have held that such non-specific teaming agreements are unenforceable, because they are merely “agreements to agree.” *Advance Telecom Process, LLC v. DSFederal, Inc.*, 119 A.3d 175, 224 Md.App. 164 (2015); *Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 939 F. Supp. 2d 572 (E.D. Va. 2013), *aff'd*, 549 F. App'x 211 (4th Cir. 2014).



# Teaming Agreements – Post-award subcontract (cont'd)

## How can a subcontractor create an enforceable right to a subcontract?

- These approaches can't guarantee success, but offer the best chance.
- BE SPECIFIC! Don't end up with an agreement to agree.
- Specify that a subcontract WILL BE AWARDED if the prime contractor wins the targeted opportunity.
- Specify workshare, by type of work, or percentage. Specify whether calculated annually, for overall contract, or per task order (if applicable).
- Specify subcontract pricing. If billing rates cannot be stated in the TA, there must be a mechanism to determine the subcontract price.



# Teaming Agreements – Post-award subcontract (cont'd)

## How can a subcontractor create an enforceable right to a subcontract?

- Scrutinize termination clauses. Do not agree that the TA will terminate if subcontract not negotiated in a certain amount of time (30-90 days typically).
- To the extent possible, eliminate all language that conditions the subcontract on the occurrence of other events.
- Consider attaching the subcontract form that will be used if the prime contractor wins the targeted opportunity.
- Consult with counsel or experienced contracts professionals. Consider alternatives to teaming agreements.



# Teaming Agreements – Pre-Negotiation Questions

- Do I need an enforceable Teaming Agreement?
  - If the proposal effort is light, the Team Leader is a trusted entity, and the work is not essential to your business, a standard unenforceable TA may be fine.
- Do I have the bargaining power to obtain an enforceable Teaming Agreement?
  - If the Team Leader can win the work without you, you likely do not.
- Why negotiate an unenforceable agreement?
  - Pre-award commitments would be enforceable.
  - Many contractors actually do what they agree to do. So it's always worth trying to negotiate the best price and workshare terms that you can.
  - When subcontracting from a large business, require it to name you in the proposal and specify the work you will perform in the proposal. If it has a small business subcontracting plan, it may trigger the protections (albeit limited) of the Small Business Jobs Act. See 13 CFR § 125.3(c)(3), (4).
  - Test the value of the relationship. If the Team Leader refuses to even name you in the proposal, then this effort may not have value, and you can commit resources elsewhere.

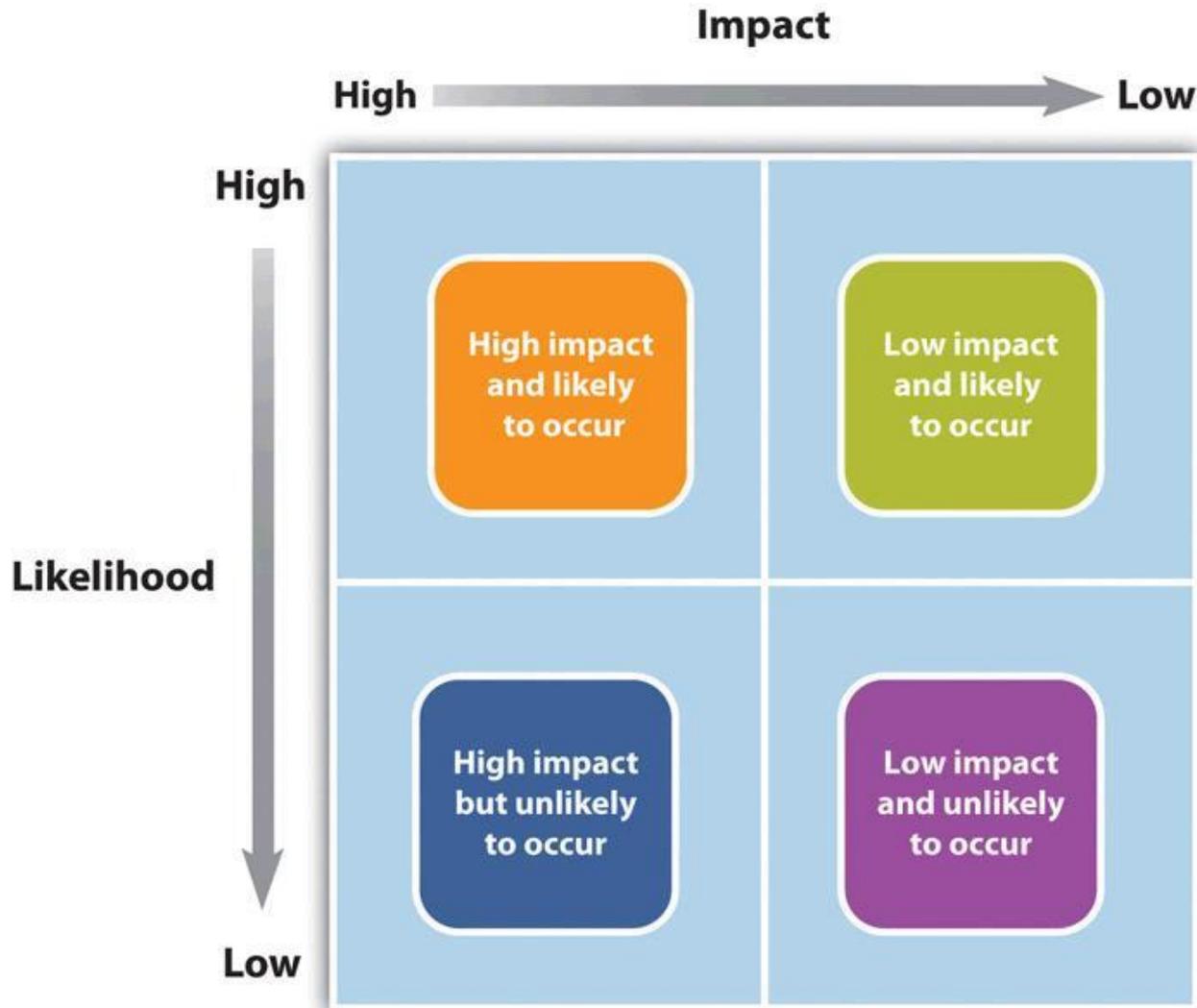
# Teaming Agreements – Key Subcontract Clauses?

- Subcontractor can use TA to specify key clauses that must be included in the subcontract.
  - Payment 45 days after submitting invoice to prime contractor; or if payment after prime receives payment from Government, then pay subcontractor in shortest time possible after receipt (i.e., 5 business days?).
  - Termination for convenience: prime can terminate subcontract, only if Government terminates sub's work -- NOT just for prime's convenience.
  - For task-order contracts, sub may want right to see every request for task order proposal issued by Government, and may want right to submit proposal, i.e., "drag-along" prime to bid on task order.
  - Consider any other clause in subcontract potentially important to subcontractor – TA may be best opportunity to ensure its inclusion.

# Subcontracts – Overview

- Statement of Work & Pricing
- Changes & Termination Clauses
- Inspection and Acceptance
- Payment
- Liability
- Dispute Resolution

# It's All About Risk Management...



# Prime Contract Flow – Downs

- Always review the prime contract.
- Be aware of general flow-downs incorporating the entire prime contract into your subcontract.
- Review specific provisions being flowed down from the prime contract into your contract.
  - For commercial items, FAR requires few, if any, prime contract clauses to be flowed down to subcontractors.

# Statement of Work

Do you have one? How can you assess risk without a SOW?  
Items to Consider in the SOW:

- Workshare – How is it determined?
- Key Personnel – Replacement issues?
- Benchmarks and Deadlines
- Deliverables
- Specifications – Quantity and Quality
- Acceleration and Delay



# Changes & Termination Clauses

## Change Clauses

- Flowdown from govt vs. prime's unilateral changes (to drawings, specs, designs, delivery, method of shipment, quantity)
- Notice deadlines

## Termination Clauses

### Default (or "Cause")

- specific;
- cure period;
- reasonable costs accrued;
- dispute provision;
- limitation of liability

### Convenience

- None;
- Govt only;
- Mutual
  - Notice period – as long as possible



# Inspection, Acceptance and Warranties

## Step 1 – Know the Prime Contract

- Review the RFP – Sections E, H and I of the RFP have the contract terms that will apply to the prime contract. Review the prime contract inspection and acceptance clause (referenced in section E), and any warranty clauses (Section I or FAR 52.212-4 for commercial item contracts). Now you know what obligations the Prime has to the Government, and you are prepared to negotiate.

## Step 2 – Negotiate

- Many subcontractors simply do not push back on the subcontracts presented to them by their prime contractors.
- Watch out for T&M or labor hour subcontracts that try to “back door” firm fixed price concepts (such as no cost re-performance) through the inspection and acceptance, and warranty clauses. This is “the best of both worlds” for the prime and “the worst of both worlds” for the subcontractor.

# Payment – Contract Types

- Is payment owed within a set amount of time (30 days from submission of a proper invoice?) or is it contingent upon other events?
- Understand the difference between “pay-when-paid” and “pay-if-paid.”
- Review any clause that allows for set-off or non-payment.



# Liability (1 of 2)



## Indemnification Provisions

Avoid –

- Overly broad indemnification provisions (e.g. “indemnification arising out of the performance of the subcontract”)
- Providing indemnification for claims arising out of the conduct of others (e.g. “whether arising in whole or in part”)
- Intellectual property indemnification when you are not providing design work

## Liquidated Damages

- Payments in lieu of actual damages
- What is the daily damages rate?
- How is it calculated?
- Exclude –  
force majeure, excusable delay or action initiated by 3<sup>rd</sup> party

# Liability (2 of 2)

## Limitation of Liability

- Seek to waive indirect, consequential, special, incidental damages. Be careful about disclaiming “lost profits” damages, which can be direct as well as consequential. Both sides may want right to recover “lost profits” that qualify as direct damages.
- Cap overall liability at contract price or reasonable fixed amount.

# Dispute Resolution



- Always consider:
  - Choice of law
  - Jurisdiction
  - Venue
- Escalation – good faith resolution between principals, non-binding mediation, arbitration or court
- Prevailing party attorneys' fees ?

# Questions

# Conclusion



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# Conclusion



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